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ABSENTEE.

1. No *personal* judgment, in the absence of a citation or its equivalent, can be rendered, so as to be obligatory against an absentee. The only good purpose which can be attained by calling an absent person in warranty, through a curator *ad hoc*, is the giving of notice, as far as practicable, to the warrantor, of the pendency of the action. But it does not justify the rendition of a final judgment. *Pagett* v. *Curtis*, 451.

See CITATION—*Cox* v. *Bradley*, 529.

ACCOUNT.

See PRESCRIPTION—*Graham* v. *Sykes*, 40.

ACTION.

1. Where it is alleged in the petition, that the claim sued on has been reduced to a judgment in a foreign country, the plaintiff cannot establish it by parol evidence; the original cause of action being merged in the judgment, the suit must be considered as brought upon it. *Jones* v. *Jamison*, 35.

2. Although in a petitory action the plaintiff must recover on the strength of his own title, yet when the defendant has no title at all, he cannot, as a trespasser, take advantage of any defect in the muniments of title shown by the plaintiff; in such a case, a title apparently good is sufficient to maintain a petitory action. *Zeringue* v. *Williams*, 76.

3. The thirty days notice required by law to be given to the debtor, is a prerequisite to the institution of the hypothecary action. *Gentis* v. *Blasco*, 104.

4. In a petitory action, the plaintiff, to recover, must show a title which can be traced back to an author, who had in himself the right of property in the thing sold. *Brown* v. *Brown*, 169.

5. Where it is shown that the plaintiff's vendor acquired his title to the property in dispute, by an amicable act of partition made of the effects of a succession of which he was an heir, it will not suffice, to sustain a petitory action, to produce alone the act of partition—the plaintiff must, in addition, show that the successor of the person from whom his vendor inherited was the owner of the property which he acquired under the act of partition. *Ibid.*

6. Where a party, being harassed by suits, pays, under protest, money which is claimed in violation of a city ordinance, he is entitled to maintain an action for repetition. *Laterrade* v. *Kaiser*, 296.

7. The law abhors a multiplicity of actions against the same person, and does not favor the collection of a multiplicity of actions against different and distinct persons in the same suit. *Leverich* v. *Adams*, 310.

ACTION (*Continued*).

8. Where an action was brought to recover on a note given by the defendant, to make up a loss as a partner of the plaintiff and others in a faro banking game—*Held:* That such an association is not only against good morals, but highly criminal, and courts of justice are not open to litigation of that kind. *Whitesides* v. *McGrath*, 401.

9. The general rule of law is, that the plaintiff in an action of revendication must make out his title, or the possessor will be discharged from the demand. As against a mere naked possessor or trespasser, however, the plaintiff is not bound to show title in himself good against the whole world in order to recover. But in a petitory action, *he is bound*, even against a naked possessor, to produce a title anterior in date to the possession of the defendant, in order to establish ownership in himself and repel the presumption of ownership in the defendant, resulting from his possession. *Young* v. *Chamberlin*, 454.

10. The lessee is without capacity to stand in judgment as to the question of title; nothing but the right of possession can be determined on the trial of the case between the lessee and plaintiff. *Ibid.*

11. Before the lessee's possession can be disturbed in a petitory action, the plaintiff must show a good and perfect title in himself, as required by Art. 44 of the Code of Practice. *Ibid.*

12. The plaintiff in a petitory action has no right, on the trial of the case with the lessee, to offer evidence to establish that the lessor derived his title from the same common source or author with himself; but in such a contest, he must recover the possession on the strength of his own title, and not on the weakness of the lessor's, as shown by the evidence, in a case to which the lessor is no party. *Ibid.*

13. No distinction can be made, as to the incapacity to stand in judgment, in a petitory action, between an agent in possession of land, with full power of attorney to manage and superintend, and to sell, mortgage, lease and hire the same, upon such terms as may seem to him proper and advantageous, and a lessee of the land. *Ibid.*

14. Where heirs at law bring a suit to recover from the administrator of the succession of their deceased ancestor, the price paid for the property of the succession, at a sale made by order of court, although in the petition they may claim to be recognized as heirs, yet their action is a personal one. *Bennett* v. *Alexander*, 469.

15. An action of revendication may be defeated by proof of an outstanding title in a third person; for the plaintiff in such an action must succeed by the strength of his own title. But such proof might be rebutted by proof of disclaimer of title by such third person. In the same manner, a title derived from a person pretending to act under a power of attorney, which did not confer the authority to make the title, is valid, if it be proved that the mandator has ratified the act of his agent.

Baines v. *Burbridge*, 628.

See SALE—*Bachemin* v. *Chaperon*, 4.
See DAMAGES—*Carter* v. *Tufts & Hobart*, 16.
See SALE—*Zeringue* v. *Williams*, 76.
See TUTORS AND TUTORSHIP—*Graham* v. *Hester*, 148.
See PRACTICE—*Nouvel* v. *Bollinger*, 293.

ACTION, PETITORY.

1. Where a party has expressly recognized the title of another to property, and thus estopped himself from questioning the validity of such title, a party holding the same property under him as vendee must be held to a recognition of that title, and must show that he has acquired the same, or fail in maintaining his right to the property. *Girault* v. *Zuntz*, 684.

2. If either the pleadings or evidence show that both parties trace their titles to the same source, neither will be permitted to attack the title of their common author. *Ibid.*

3. A party cannot controvert the title of one under whom he claims. *Ibid.*

ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

AFFIDAVIT.

See SEQUESTRATION—*Mabry* v. *Tully*, 562.
Carter v. *Lewis*, 574.

AGENT AND AGENCY.

See PRINCIPAL AND AGENT.

APPEAL.

1. An admission of part of the claim sued on made by the defendant, and a deposit by him of such amount in court before the trial of the cause, although the balance of the claim is not appealable in amount, will not prevent the defendant from appealing, unless the plaintiff, upon the confession and deposit being made, takes a partial judgment for the amount confessed, with a reservation of his right to prosecute to final judgment the balance of the claim. *Blache* v. *Aleix*, 50.

2. Where the record of appeal is not complete, in consequence of the failure of the plaintiff to file with the Clerk certified copies of records offered in evidence, a writ of *certiorari* will not enable the defendant who is appellant to complete the record, and in such case, the judgment of the lower court will be reversed, and the cause remanded for new a trial. *Hagan* v. *Gaunt*, 63.

3. The want of citation is a cause of nullity, which may be urged on appeal. *Shannon* v. *Goffe*, 86.

4. Where the appellee has moved for and obtained the dismissal of an appeal, the case not having been tried on its merits, the appellant may appeal again if he claims the right to appeal within a year from the rendition of judgment. *Dugas* v. *Truxillo*, 116.

5. When the principal demand is not appealable in amount, and the evidence shows that there is no real foundation for the demand in reconvention for an amount over three hundred dollars, nor any legal ground for supposing such amount could be recovered, the appeal will be dismissed. *Gagné* v. *Barrow*, 135.

6. It is no part of the duty of the Clerk of the Court to prepare the appeal bond, and when the appeal bond was left with the Clerk in blank, to be filled up with the names of the proper obligees—*Held*: That the omission to insert the proper names, is not an irregularity from which the appellant may be relieved under the statute of 1839. *Green* v. *Bowen*, 173.

APPEAL (*Continued*).

7. Where the amount in controversy is less than three hundred dollars, the Supreme Court cannot look into the facts, to see whether the lower court has, or has not made a false application of a legal ordinance or a constitutional law; all they can do in such a case, is to examine the legality or constitutionality of the ordinance, or the constitutionality of the statute under which a tax or impost, or municipal fine has been imposed.

Baton Rouge v. *Malverhill*, 215.

8. An appeal will not lie to the Supreme Court in an injunction suit arresting the execution of a judgment for less than three hundred dollars, although the property seized is worth more than three hundred dollars, and an unreal demand for a larger amount of damages is claimed in the petition.

Porée v. *Valische*, 292.

9. Until a party has executed his bond in such sum as is ordered by the Judge granting an appeal, his appeal is not perfect, either as a suspensive, or a devolutive appeal. But where the appellant has complied with the Judge's order, and given bond in the sum fixed, if the bond is insufficient for a suspensive appeal, still it is good for a devolutive appeal.

Keenan v. *Whitehead*, 333.

10. No appeal will lie from an interlocutory judgment refusing the removal of a case, on the application of defendant, from a State to a Federal Court. The only remedy the defendant has in the Supreme Court is by appeal from the final judgment which may be rendered against him in the cause. Upon such appeal, he may assign as error the refusal of the District Court to remove the cause. *State* v. *Judge Fifth District Court*, 336.

11. The curator *ad hoc* appointed to defend a non-resident has the right of appeal. *Langley* v. *Burrows*, 392.

12. Where a suit was instituted against a party individually and as tutor of his minor children, and judgment rendered in his favor in this double capacity, and upon appeal, the bond was only executed in his favor individually—*Held:* That the appeal ought to have been taken against him in both capacities, otherwise the minors are not parties to the same.

Bazergue v. *Faucheux*, 393.

13. A party is entitled to an appeal from a conviction in a Recorder's Court, where a fine of more than three hundred dollars has been imposed.

State v. *Benit*, 406.

14. The provisions contained in Arts. 896 and 897 of the Code of Practice, relative to the assignment of errors on appeal to the Supreme Court, are not applicable where the record is certified to contain all the testimony adduced on the trial. *State* v. *Giffin*, 420.

15. This court is only seized of jurisdiction to amend the judgment as between appellant and appellee; not as between the appellees. Article 890 of the Code of Practice declares that if the appellee demand the reversal of any part of the judgment or damages, he shall file his answer at least three days before *that fixed* for the argument, otherwise it shall not be received. This clause has reference to the first fixing for trial in this court.

Converse v. *Steamer Lucy Robinson*, 433.

APPEAL (*Continued*).

16. An appellee cannot, by a motion in the Supreme Court, procure an amendment of the judgment as against another appellee. He can exercise this right only against the appellant. *Burton* v. *Davis*, 448.

17. In a suit brought against the maker of a promissory note, and a commercial firm as endorsers, where judgment by default was made final against the maker, and during the pendency of the suit one of the firm died, and his heirs never having been cited, the case was tried only as to the remaining endorsers, and upon plaintiff's appealing, the defendants moved to dismiss the appeal because all the parties to the suit had not been made parties to the appeal—*Held:* That as the suit was tried in the absence of the other parties, there could be no objection to an appeal in the same form. *Miltenberger* v. *McGuire*, 486.

18. Where the appellant has failed to give bond in favor of all the parties interested in maintaining the judgment, the appeal must be dismissed. *Maples* v. *Peed*, 496.

19. Whenever the contest between the defendant and his warrantor puts at issue the defendant's *right* to recover of the warrantor a sum exceeding three hundred dollars, although the demand of the plaintiff and the actual demand in warranty be less than three hundred dollars, the Supreme Court will have jurisdiction over defendant's demand against his warrantor. *Vicksburg R. R.* v. *Hamilton*, 521.

20. In the country parishes judgments are only signed at the end of the term; and orders of appeal granted between the time of rendition of the judgment and signing by the District Judge, are not premature. *Ibid.*

21. The decision in the case of *Nouvet* v. *Armant*, 12 An. 72, affirmed, to the effect that, where the appeal bond was insufficient at the time the appeal was brought up, the substitution of a new bond cannot cure the defect. *Vicksburg R. R.* v. *Hempkin*, 523.

22. Where an appeal has been brought up informally as to one appellant, but he has been made an appellee by his co-appellant, the appeal will not be dismissed. *Cox* v. *Bradly*, 529.

23. Where an order is granted by the District Judge, allowing a devolutive appeal to all parties, upon giving bond, and one of them only avails himself of the order in time, the others will be considered as having abandoned their right of appeal. *Willims* v. *Leblanc*, 591.

24. Where a party obtains a suspensive appeal and fails to take it up, if there is nothing to show an inability on his part to perfect such appeal by giving the bond required, he will be held to have abandoned it, and cannot afterwards take a devolutive appeal. *Tarlton* v. *Wofford*, 592.

25. No appeal lies from an order of the District Judge granting a new trial before his judgment has become final, such an order is within the discretion of the District Judge, is interlocutory, and does not work an irreparable injury. *Wheeler* v. *Maillot*, 659.

26. Where the principal matter in dispute is the title to property shown by affidavit to be worth over $300, an appeal will lie to the Supreme Court, although the money demand and judgment in the case be for a less sum than $300. *Succession of Renneberg*, 661.

APPEAL (*Continued*).

27. A devolutive appeal was made returnable on the first Monday of November and a rule for an extention of time was filed on the 19th of the same month—*Held:* That where a party takes a devolutive appeal, and fails to file the transcript by the return day, if it appears that no fault was imputable to him, he is entitled to an extention of time.

Massey v. *Helme*, 692.

28. Where there is no assignment of errors, no statement of facts, special verdict or bill of exceptions in the record, and it appears from the certificate of the clerk that through the negligence of the appellant a portion of the evidence on which the case was decided in the lower court, is not contained in the record, the court will *ex officio* dismiss the appeal.

Morton v. *Steamboat Chalmette*, 708.

29. An appeal from an order setting aside an attachment in the case of an absentee, if taken within the legal delay of ten days, will have the effect of suspending the execution of the judgment; and an appeal bond for costs only is required for such an appeal. *Watson* v. *Simpson*, 709.

30. Where a transcript is filed on the fourth judicial day after the return day, and exclusive of that day, the appeal will be dismissed.

Rhea v. *Steamer John Simonds*, 712.

See COURTS—*State* v. *Judge Fifth District Court*, 34.
See EXECUTION—*Graham* v. *Eagan*, 97.
See SEQUESTRATION—*Carter* v. *Lewis*, 574.
See JURISDICTION—*Ney* v. *Richard*, 603.
See CERTIORARI—*Trudeau* v. *Jackson Railroad*, 717.

ARBITRATION.

See JUDGMENT—*Peniston* v. *Somers*, 679.
See STATUTES—*Baxter* v. *Sisters of Charity*, 686.

ARREST.

1. It is not sufficient that the creditor, in a proceeding to arrest a debtor, should swear that all the facts and allegations in the petition are true *to the best of his knowledge and belief;* he must swear *positively* to the specific claim on which he sues, and to his belief of the truth of the other allegations in his petition. *Herwig* v. *Beach*, 261.

2. By the City Ordinances, the Commissaries of the markets are authorized to have disturbers of the public peace arrested; and the arrest of an individual, on the charge of taking possession of another's stall in market, without his permission, is unlawful, unless ordered by the Commissary.

Tujacque v. *Weisheimer*, 276.

See NEW ORLEANS—*Douat* v. *Beombay*, 377.

ASSESSMENT.

See TAXES, &c.

ATTACHMENT.

1. An attachment will lie in an action for damages arising *ex contractu*, when the claim does not rest upon such uncertain elements of damage as absolutely to preclude the plaintiff from making an affidavit as to the amount of the debt. *Hyde & Mackie* v. *Higgins*, 1.

ATTACHMENT (*Continued*).

2. In case of proceedings for the distribution of the proceeds of a steamer, the suit of the attaching creditor is not stayed by order of the Judge, nor by operation of law; nor is he actually or virtually enjoined from proceeding to judgment against his debtor, and acquiring a right of privilege on the proceeds of the property attached; nor from proceeding to execution and sale of the property itself for the satisfaction of his debt. In all such cases, the property is not vested in the creditors, but *remains in the debtor* subject to seizure, attachment and execution. *Owens* v. *Davis*, 22.

3. A garnishee who pays over the funds attached in his hands to the Sheriff, after the return of the writ of attachment, without an order of court, or the consent of the plaintiff, does not thereby release himself from the plaintiff's claim. *Yale* v. *Whitmore*, 63.

4. A creditor who has proceeded by way of attachment, prior to the proceeding by sequestration, acquires a privilege on the property attached, and a preference over the other creditors, *Tufts* v. *Casey*, 258.

5. In a twofold action by attachment against the debtor, and to set aside the sale of the property attached, and where the property was bonded by the vendee—*Held:* That the plaintiff's remedy was twofold, against the bond by means of the attachment, and against the property through the revocatory action. *Ranlet* v. *Constance*, 423.

6. Where an affidavit is made, that a debtor has left the State with the intention not to return, his subsequent return will not alone be sufficient to dissolve a writ of attachment, where there are circumstances which render it probable that the original intention was not to return. *Simons* v. *Jacobs*, 425.

7. After an affidavit has been made for an attachment, some *prima facie* proof must be made by the defendant, that the facts sworn to are untrue, in order to throw the burden of proving their verity on the plaintiff. The affidavit has a greater effect than merely enabling the party to obtain process against defendant. *Ibid.*

8. If an attachment of a steamboat be bad as to some of the owners, on the ground that they are residents of this State, it must be set aside *in toto*. *Converse* v. *Steamer Lucy Robinson*, 433.

9. The title to the proceeds of a note, bill of exchange, or account, does not pass by virtue of an order to pay over to a creditor the proceeds, when collected, given by the holder and owner to his attorney, and accepted by the attorney, but they are subject to attachment as the property of the holder, as long as they remain uncollected in the hands of the attorney. *Robertson* v. *Scales*, 545.

10. Where the holder of a draft, having placed it in the hands of an agent for collection, transferred the receipt of such agent to a third person, and after such third person had notified the agent of the transfer, but before the delivery of the draft, or notice of transfer had been given to the debtor, the creditors of the holder brought a suit by attachment against the agents, and by process of garnishment caused the draft to be seized—*Held:* That the attachment must be maintained, and the rights of the creditors, to an amount sufficient to satisfy their claim against the transferror, recognized as against the transferree. *Hill* v. *Hanney*, 654.

ATTACHMENT (*Continued*).

11. A writ of attachment in the case of *an absentee* is not a remedy incident to a main action, but is the foundation of the action; and an order setting aside the attachment terminates the suit, unless an appeal is taken from it. *Watson* v. *Simpson*, 709.

12. Where a party brought a suit by attachment against a vessel for damage done to freight, and the attachment was released upon the execution of a mortgage by the master of the vessel upon the ship to secure the payment of such judgment as might be rendered in the suit—*Held:* That the acceptance of the mortgage instead of the bond which should have been given to release the attachment, deprived the attaching creditors of their remedy upon the vessel in the hands of *bona fide* purchasers for value and without notice, since the mortgage was a nullity under the laws of Louisiana. *Hunter* v. *Bennett*, 715.

See HUSBAND AND WIFE—*Hart* v. *Gottwald*, 13.
See SALE, JUDICIAL—*Anderson* v. *Valentine*, 379.
See SHIPPING—*Maury* v. *Watts*, 430.
See REDHIBITION—*Childs* v *Wilson*, 512.
See APPEAL—*Watson* v. *Simpson*, 709.

ATTORNEY-AT-LAW.

1. An attorney-at-law is entitled to commissions on a judgment obtained by him, although he be superseded by an appointment of another attorney, and the amount of the judgment collected by his successor. *Commandeur* v. *City of Carrollton*, 7.

2. An administrator cannot, on appeal, have a judgment apparently regularly rendered, homologating an account of his administration, set aside, on the ground that the attorney who filed such account was unauthorized to act for him; he should resort in such a case to the action of nullity. *Succession of Sullivan*, 200.

3. Where interrogatories were addressed to an attorney, to ascertain who was his client, when that relationship commenced and ended, and what money had been received, and what paid over, and to whom paid—*Held:* That none of these matters are privileged communications within the meaning of Article 2262 of the Civil Code. *Shaughnessy* v. *Fogg*, 330.

4. An attorney may be asked through whose agency, or in what manner, or at what time, he was retained. *Ibid.*

5. An attorney should be excused from answering interrogatories, when he declares on oath that he cannot answer the same without disclosing matters confided to him by his client, or advice given by him to his client concerning business about which he was retained. *Ibid.*

6. Where an attorney entrusted with notes for collection, becoming unable to attend to it himself, placed them in the hands of another lawyer at the same bar, who instead of prosecuting the suit on the notes to judgment against the maker and his sureties, received from the maker other notes in the place of these, on which suit was instituted and judgment recovered in the name of the plaintiff, on which judgment the *plaintiff received nearly the whole amount of the notes originally entrusted*—*Held:* That these proceedings constitute a ratification of the acts of the sub-agent, and the attorney originally employed is not liable. *Beau* v. *Drew*, 461.

ATTORNEY-AT-LAW (*Continued*).

7. An attorney ought not to testify as to matters confided to him by his client. *Holmes* v. *Barbin*, 553.

8. Where a party denies under oath, that a plea filed in his name by an attorney was filed with his authority, and the allegation is borne out by the proof, the act of the attorney is not binding. *Decuir* v. *Lejeune*, 569.

See CRIMINAL LAW—*State* v. *Hazleton*, 72.
See INTEREST—*Bonner* v. *Copley*, 504.
See REDHIBITION—*Burnham* v. *Hart*, 517.
See ATTACHMENT—*Robertson* v. *Scales*, 545.
See MALICIOUS PROSECUTION—*Glascock* v. *Bridges*, 672.
See INSOLVENCY &c.—*Shropshire* v. *His Creditors*, 705.

BANKRUPTCY.

See INSOLVENCY &c.—*Beach* v. *Miller*, 601.

BANKS AND BANKING.

1. Where by the charter of a bank the default of a stockholder to pay one of the installments of the stock loan at maturity, renders the whole amount of the loan immediately exigible, and deprives the stockholder of the delays to which he was originally entitled, the bank has a right to waive the enforcement of this entire obligation of its defaulting debtor; and where such waiver has been made, the Clerk of the court cannot, by his order of seizure and sale, give greater relief than has been sought in the petition. *Ives* v. *Citizens' Bank*, 83.

2. If the plaintiff shows injury to himself by the sale of property under such an order, even the *bona fide* purchaser's title is not valid. *Ibid.*

BATTURE.

See NEW ORLEANS—*Remy* v. *Municipality No. Two*, 657.

BILLS OF EXCEPTION.

1. Where, by agreement of counsel, all the evidence taken in writing on a previous trial was to be received, subject only to the exceptions that might be made to its admissibility, on appeal, the Supreme Court will not notice bills of exception which were taken on the previous trial. *Thompson* v. *Parent*, 57.

2. Where a memorandum of objection to the admission of a document offered in evidence was found in the record—*Held:* That unless the grounds of objection are stated, such a memorandum cannot be noticed by the Supreme Court as an exception to evidence. *Heiss* v. *Corcoran*, 694.

3. Where witnesses have been offered and cross-examined without objection and written evidence offered and received without a proper and intelligible exception reserved, the party against whom such parol and written evidence has been given cannot be heard to object in this court to its admissibility. *Ibid.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The law creates a legal presumption that a promissory note has been given for a valuable consideration, but this presumption may be rebutted, and the payee required to prove the consideration. *Martin* v. *Donovan*, 41.

2. Where the existence of the consideration is expressly put at issue, and doubt or suspicion cast upon its reality, the burden of proving it is thrown upon the payee. *Ibid.*

BILLS OF EXCHANGE AND PROMISSORY NOTES (*Continued*).

3. A notice of protest served on the endorser at his residence in New Orleans on the day after the protest is sufficient. *Blackman* v. *Leonard*, 59.

4. A due bill is a mere acknowledgment of a debt, and the promise to pay money being only implied, it does not fall within the definition of a promissory note, and cannot be prescribed as such by five years. *Garland* v. *Scott*, 143.

5. Where a note was given by the owner of a slave, who was suspected of having destroyed valuable property of the payee, in settlement of the damages supposed to have been caused by the act of the slave in setting fire to his stables—*Held:* That there was nothing illegal in such a settlement, and the payment of the note could not be avoided, unless it was shown that a capital felony had been compounded, by making it a condition of the settlement that the slave should not be prosecuted for the crime of arson, of which he was suspected. *Morgan* v. *Knox*, 176.

6. Where money raised by contributions to relieve the sufferers from a destructive fire was loaned out by the committee to the sufferers without interest, for a certain period, they giving their notes payable to the holder—*Held:* That the makers of the notes having made a special contract with the committee, could not plead want of consideration, and not being owners of the fund themselves, were precluded from inquiring how the committee obtained the money. *Bayou Sara* v. *Harper*, 233.

7. Where a note payable to order is transferred by special endorsement, the party who sues on it must prove the special endorsements to entitle him to recover. *Talamon* v. *Myers*, 257.

8. The drawer of a bill of exchange is entitled to notice of protest upon the refusal of the acceptor to pay the amount, and cannot be held liable unless such notice is given. *Grieff* v. *Kirk*, 320.

9. In the absence of special notice brought home to the holder of a bill of exchange, as to the objects for which a credit or authority to draw is given, it is no defence to an action on a bill drawn under an unconditional authority, that the authority was intended to have been used in a particular form. *Hutchinson* v. *Mitchell*, 326.

10. In an action against the acceptor of a draft, where the defence set up is want of consideration, the burden of proof rests upon the defendants to show such want of consideration. *Nevins* v. *Chapman*, 353.

11. Where a suit is brought on a promissory note, and want of consideration is set up as a defence, if the note on its face purports to have been made for a valuable consideration, and it is shown that the parties have dealings together, and that the plaintiff lent money out on interest, the burden of proof rests upon defendant to show a want or failure of consideration. *Henderson* v. *Giraudeau*, 382.

12. Where a bill of exchange was given for a sum of money loaned, and it was agreed that upon the borrower's executing a mortgage to secure the payment of the sum, the bill of exchange should be given up—*Held:* That although the mortgage was objected to when presented, yet the fact that it was retained and suit instituted on it, would act as a waiver of the objection, and all recourse on the bill of exchange be lost. *Johnson* v. *Watt*, 428.

BILLS OF EXCHANGE AND PROMISSORY NOTES (*Continued*).

13. This exception is not personal to the principal debtor. *Ibid.*

14. Where an account has been settled by a promissory note, the note is *prima facie* evidence of a lawful and valuable consideration, and if the note is given in error, or there is a total or partial failure of consideration, or the account for which it is given is tainted with usury or fraud, the burden of proof rests upon the maker of the note to establish any or all of these facts to rebut the legal presumption in favor of its validity.
Byrne v. *Grayson*, 457.

15. The Commercial Code was never adopted by the Legislature, and the general principles of the Civil Code in regard to joint obligations and obligations *in solido* are applicable to commercial paper.
Shreveport v. *Gooch*, 474.

16. There is no provision of law which exempts acceptances from the operation of the rule laid down in Art. 2088 of the Civil Code, which provides that "An obligation *in solido* is not presumed: it must be expressly stipulated." *Ibid.*

17. An acceptance is an absolute engagement to pay a sum of money to the holder, whether the acceptors have or have not funds of the drawee in their hands. *Ibid.*

18. A mortgage note can be transferred without the necessity of endorsement, or a written assignment. The general rule of evidence relative to contracts and obligations, established by Art. 2257, applies as well to commercial paper, there being no law excepting it from the operation of this rule. *Griffin* v. *Cowan*, 487.

19. The want or failure of consideration of a note, or its illegality, may be established by parol, and the parties to the instrument have the right to inquire into the consideration. *Ibid.*

20. The transfer of a draft, in order to be binding as regards third persons, must be made by delivery of such draft to the transferree, and notice to the debtor, of the transfer. *Hill* v. *Hanney*, 654.

21. The sale of personal property is void as to creditors, unless possession is given before they acquire rights on the same; and if personal property be transferred by contract, but not delivered, it is liable in the hands of the obligor to seizure and attachment in behalf of his creditors. This rule of law extends to the sale of a promissory note or bill of exchange. *Ibid.*

22. Where, in protesting a note, the Notary declared that he presented it for payment through his deputy, and certified that he notified the endorser, by a letter to his address put in the Post Office, after vain attempts made to find him or his domicil, and the evidence showed that the endorser resided in the same city with the Notary, and was a person well known, and that he or his residence might have been found by the Notary—*Held:* That in such a case, the endorser would not be liable, on account of the want of notice. *Heiss* v. *Corcoran*, 694.

See AGENT AND AGENCY—*Ducongé* v. *Forgay*, 37.
See EVIDENCE—*New Orleans* v. *Congregation Dispersed of Judah*, 389.
See PRINCIPAL AND AGENT—*Miltenberger* v. *McGuire*, 486.

BONDS.

See PRACTICE—*Vicksburg Railroad* v. *Barksdale*, 465.
See EXECUTORS AND ADMINISTRATORS—*Soldini* v. *Hyams*, 551
See COURTS—*State* v. *Branner*, 565.

BROKERS.

See PRINCIPAL AND AGENT—*Séré* v. *Faurès*, 189.
See OFFENCES AND QUASI OFFENCES—*Mummy* v. *Haggerty*, 268.

CERTIORARI.

1. Where a diminution of the record is suggested, the Supreme Court will order a *certiorari* to perfect it, although the case has been submitted for judgment. *Trudeau* v. *Jackson Railroad Co.*, 717.

See COURTS—*State* v. *Judge Fifth District Court*, 34.
See APPEAL—*Hagan* v. *Gaunt*, 63.
See JURISDICTION—*Tuenzer* v. *Judge Third District Court*, 120.

CITATION.

1. Where the citation is served at the domicil of a party, the omission of the Sheriff to state in his return that the person upon whom the service was made resided in the house with the defendant, will be a fatal objection to the citation. *Feazel* v. *Cooper*, 462.

2. In a proceeding in garnishment against an absentee, the citation should be affixed to the court-house door, in conformity with Art. 254 C. P., and not merely served on the curator *ad hoc;* and in such a case, the party seeking to detain the property of the absent debtor in the hands of the garnishee must give bond, as required by Art. 245 C. P.
Cox v. *Bradley*, 529.

CLERKS OF COURT.

1. The Act of 1855, conferring upon Clerks of Courts power to homologate accounts and tableaux of distribution after thirty days notice, does not deprive the courts of the power, as previously exercised, to homologate such accounts and tableaux after ten days notice.
Succession of Spivey, 248.

2. Power is vested by an amendment of the Code of Practice in the Clerks of District Courts, to grant orders of injunction in the absence of the Judge from the parish, or when he is interested in the cause; but they are in all cases required to take bond and security from the party at whose suit the order of injunction is granted. *Witkowski* v. *Selby*, 328.

See BANKS AND BANKING—*Ives* v. *Citizens' Bank*, 83.
See APPEAL—*Green* v. *Bowen*, 173.

COLLATION.

1. Money received by one of the heirs in the distribution of the succession of the deceased ancestor in another State, forms no part of the succession in Louisiana, and the heir is not bound to collate money thus received in a partition made in Louisiana of the Louisiana succession; but where such money was received under a clause in the will making a donation of the amount to the heir on the illegal condition of the enforcement of a substitution in this State, the heir will not be allowed to take advantage of the legacy, and at the same time benefit by the repudiation of the illegal condition: in such case, there must be collation of the money received in another State. *Hoggatt* v. *Gibbs*, 700.

See SUCCESSION—*Succession of Tournillon*, 263.

COMMISSION.

See EVIDENCE—*Langley* v. *Kinkead*, 392.

COMMON CARRIERS.

1. Where it is the custom of common carriers to allow the baggage of passengers to be taken in charge by servants in their employ, to be delivered by them at a certain place and in a certain manner, they will be liable for the loss of baggage arising from the neglect of their employees to make the delivery according to custom. *Fisher* v. *Geddes*, 14.

2. In contracts of affreightment which do not stipulate a time for delivery, the merchant or shipper is entitled to a reasonable time, after the ship or other vessel is ready to receive on board the goods, to make a delivery of the same; and he is entitled to this delay, whether the contract of affreightment be by charter-party or for the conveyance of goods in a general ship, or other vessel. *Williamson* v. *Dolsen*, 94.

3. The common carrier may restrict his liability by express special contract. *Roberts* v. *Riley*, 103.

4. A common carrier is, notwithstanding a special agreement, liable for the carelessness or unskillfulness of his crew. The injury being proved, the burden of proof is on the carrier to show that it was caused by *accident* or *vis major*, or where the shipper has, by contract, undertaken the exclusive management of the things shipped during the voyage, then it must be shown that the injury has occurred by the fault of the shipper or his servants. *Ibid.*

5. Where flour was stowed upon a vessel, either improperly, or in such proximity to an offensive and injurious oil as to suffer damage, and it was shown that the common carrier had been put on his guard, as to the danger from such oil to the flour—*Held:* That he was responsible for the damage sustained by the flour. *Cranwell* v. *Ship Fanny Fosdick*, 436.

6. The first obligation of the common carrier is to indemnify the shipper for the loss or injury of goods committed to his charge, unless occasioned by accidental and uncontrollable events. *Ibid.*

7. A custom is without force in opposition to a positive law. *Ibid.*

COMMUNITY.

1. Where a marriage has been dissolved by a judgment of divorce, if the wife brings suit to recover her share of the community property, it must be shown that she accepted the community within the legal delays, after its dissolution by the sentence of divorce; otherwise, her pretensions are without foundation in law. *Succession of Ewing*, 416.

2. Where property has been adjudicated, upon the death of the husband, to the wife, as the surviving spouse in community, on the advice of a family meeting, homologated by the decree of a court of competent jurisdiction, and where the child of the deceased was a party to the proceedings, and represented in the mode pointed out by law, such adjudication is conclusive upon the child as a party to the proceedings, until it shall be reversed or annulled, either by appeal or by a direct action of nullity. *Holmes* v. *Dabbs*, 501.

COMMUNITY (*Continued*).

3. Although the Code does not expressly declare that a dissolution of the community shall result from a judgment of separation of property between husband and wife, yet such is the legitimate conclusion to be drawn from the textual provisions on this subject. *Holmes* v. *Barbin*, 553.

4. One of the objects of a separation of property is to put an end to the community. *Ibid.*

5. The wife who is divorced from her husband, and takes no steps to accept the community within the legal delays, is presumed to have renounced it. *Decuir* v. *Lejeune*, 569.

6. An heir who acquires at a sale made to effect a partition, does not become sole owner under his ancient title as heir, but is invested with a new title as purchaser, and if he be married, the purchase is presumed to be made on account of the community, unless he declare his intention to be otherwise in the act by which his acquisition is evidenced. *Breaux* v. *Carmouche*, 588.

7. The whole property in the thing sold, including his own share as heir, passes by force of the decree to the adjudicatee. *Ibid.*

8. The death of the wife dissolves the community, and with it ceases the right of the husband to stand in judgment, without the authorization of the court, in matters affecting the community property. *Poutz* v. *Bistes*, 636.

9. A party holding a mortgage, by authentic act, against community property, is entitled to executory process, after the death of the wife, only upon giving notice jointly to her testamentary executor and to the surviving husband. *Ibid.*

See HUSBAND AND WIFE—*Hart* v. *Gottwald*, 13
Pearson v. *Ricker*, 119.
Spalding v. *Godard*, 277.
McVea v. *Holden*, 317.
Leech v. *Guild*, 349.
See MARRIAGE—*Williams* v. *Hardy*, 286.
Summerlin v. *Livingston*, 519.

COMPENSATION.

1. The husband cannot plead in compensation to a debt due by him to a succession, the portion coming to his wife as heir to such succession; nor can he, as administrator of his wife's paraphernal property, receive in payment of such portion as may fall to her, *debts due by himself*, and by receipting for the same, thereby discharge the administrator from the claims of the wife, as heir-at-law of the estate. *Hanrahan* v. *Leclercq*, 204.

See INSOLVENCY &c.—*Martin* v. *His Creditors*, 165.

CONFLICT OF LAWS.

1. The law of the actual domicil of an intestate, at the time of his death, will govern in matters relating to the right of inheritance. *Abston* v. *Abston*, 137.

2. If a deed be legal by the laws of the country where it was executed, our courts will not interpose to defeat the possession of the legal holder acquired in that country, although there may be clauses in the instrument which would not have been valid under our law. *Rabun* v. *Rabun*, 471.

CONFLICT OF LAWS (*Continued*).

3. The doctrine of the common law in regard to the formality of *livery of seizin* and the creation of an estate in remainder, does not apply to the creation of a trust estate in a chattel. *Ibid.*

See INSOLVENCY &c.—*Brent* v. *Shouse*, 110.
See PRESCRIPTION—*Morton* v. *Valentine*, 150.
Mandeville v. *Huston*, 281.
MINORS—*Leverich* v. *Adams*, 310.
See MORTGAGES—*N. O. Insurance Company* v. *Tio*, 174.
See HUSBAND AND WIFE—*Quigly* v. *Muse*, 197.
McVey v. *Holden*, 317.
Leech v. *Guild*, 349.
See TRUST—*Hullin* v. *Fauré*, 622.

CONSIDERATION.

See BILLS OF EXCHANGE, &c.—*Morgan* v. *Knox*, 176.

CONSTITUTION.

1. The Legislature have the right, under the Constitution, to confer upon the Recorder's Court in New Orleans, such criminal jurisdiction as may be necessary for the punishment of minor crimes and offences, and as the police and good order of the city may require. *State* v. *Gutierrez*, 190.

2. The Article 103 of the Constitution, which guarantees to an accused the right of trial by jury, and requires that there should be an indictment or information, has no application to that class of offences which are to be tried summarily, and without the intervention of an impartial jury from the vicinage. *Ibid.*

3. Such cases as fall within the jurisdiction of the Recorder, Mayor or Aldermen, under Art. 124 of the Constitution, form an exception to the general rule as laid down in Art. 103, with regard to the right of trial by jury. *Ibid.*

4. The Legislature is vested with absolute right of legislation, except when restricted by the Constitution. *Ibid.*

5. The 3d section of the Act of the Legislature of 1859, entitled "An Act for the prevention and punishment of selling liquor to slaves," which requires that the Recorders in trying such offences should be assisted by a jury of three slave-holders, is not unconstitutional. *Ibid.*

6. A jury formed before the Recorder's Court, under a special statute, does not fall under the constitutional clause in respect to an impartial trial by a jury of the vicinage, and any number of jurors may compose the jury that the Legislature may deem proper to fix. *Ibid.*

7. The statute of 1856, conferring judicial functions upon the Mayor of Baton Rouge, is not unconstitutional. *Baton Rouge* v. *Dearing*, 208.

8. The Act of the Legislature approved March 19th, 1857, entitled "An Act relative to elections in the parish of Orleans," which provides for the appointment of a Superintendent and other officers, is not in violation of the Constitution. *State v. New Orleans*, 354.

9. This Act pertains to the body of laws for the internal government of the State, and does not form a part of the police or government of the city of New Orleans, and does not, therefore, contravene Art. 124 of the Constitution. *Ibid.*

CONSTITUTION (*Continued*).

10. The clause in this Act which requires the city of New Orleans to pay one-half of the expenses incurred to carry into effect the provisions of the same, is not in violation of Art. 123 of the Constitution, which provides that "Taxation shall be equal and uniform throughout the State," &c. *Ibid.*

11. Section 4th of the Act of 1855 provides: "That estimating the value of the property to be expropriated, the basis of assessment shall be the true value which the land possessed *before the contemplated improvement* was proposed, and without deducting therefrom any amount for the benefit derived by the owner from the contemplated improvement or work." The true intention of the Legislature in the passage of this Act was, that the contemplated improvement and the expropriation were to follow immediately upon each other; and, in this sense, the fourth section is not unconstitutional. *Vicksburg Railroad* v. *Calderwood*, 481.

12. In a suit brought by a railroad company to expropriate land—*Held:* That the defendant has no right, in addition to the price of the land expropriated, to claim payment for damage which may be done the rest of his property, when it is shown that such damage is more than compensated by advantages derived from the project. *Ibid.*

See ELECTION—*State* v. *Giffin*, 420.
See PUBLIC THINGS—*Stevens* v. *Walker*, 577.
See POLICE JURY—*Voorhies* v. *Fournet*, 597.
See INSOLVENCY &c.—*Beach* v. *Miller*, 601.

CONTINUANCE.

1. An affidavit for continuance, which does not mention the names of the absent witnesses, is insufficient. *Huft* v. *Freeman*, 240.

2. A second application for a continuance, for a ground which had already on the same trial been made and overruled, should not be heard. *Ibid.*

3. Where a commission had been obtained to procure the evidence of a witness, and on a rule taken on the opposite party to show cause why the depositions should not be read on the trial of the case, the objection was made that they were not signed by the deponent, and this objection was sustained by the court—*Held:* That in the absence of any neglect attributable to the party taking out the commission, he was entitled to a new commission, and to a continuance of the cause in the meantime. *Tarleton* v. *Bringier*, 419.

4. The object of taking a rule to show cause why testimony taken by commission should not be read on the trial, is to enable the party, in case of irregularity or informality, not attributable to himself, to remedy the defect before trial. *Ibid.*

CONTRACTS.

1. Where there is only a passive violation of a contract, by the contractors leaving the work before it was completed according to the terms of the contract, and the proof shows that the work could have been completed at no great expense, the putting in default is a prerequisite to the recovery of damages. *Rizan* v. *Prescott*, 112.

CONTRACTS (*Continued*).

2. Where, by the terms of a contract, a certain amount is due to the contractors, sub-contractors and material men are entitled to be paid out of that amount on service of their attested accounts, although the contractors fail afterwards to comply strictly with their agreement. The proper test in such a case is: had the contractors complied with the stipulations up to the time of the falling due of the installments for which the sub-contractors and material men had served their attested accounts?

St. Paul's Church v. *Giraud*, 124.

3. Equity obliges the proprietor, whose business has been well managed, to comply with the engagements contracted by the manager (*negotiorum gestor*) in his name, and to indemnify him in all personal engagements he has contracted in the management of his affairs.

Garland v. *Scott*, 143.

4. The action arising out of a *quasi contract*, like the action of mandate, partnership and *negotiorum gestor*, is prescribed by ten years. *Ibid.*

5. Where, under a special contract, a certain amount of timber was to be delivered at a certain place, and in the event of inability on the part of the contractor to deliver at that point, it was agreed that it should be delivered at another specified point, at a price equal to that if delivered at the first place, the delivery to commence at a certain time, and the contractor commenced the delivery at the place designated in the alternative some time before the time specified—*Held:* That the difference in the price could not be claimed for the timber delivered before the time specified in the contract. *Roberts* v. *Powers*, 187.

6. Where a contractor delivers and puts up defective machinery as good, and loss is occasioned by such defect, it must be viewed as an active violation of the contract, and damages may be recovered without a formal putting in default. *Hill* v. *Penny*, 212.

7. Where a party contracted to do work for the city, and the materials were furnished by a third person—*Held:* That the notification of the contractor's order upon the Comptroller for a warrant in favor of the furnisher of materials, for a portion of what might be found coming to him (the contractor) when his account should be audited, had not the effect of making the city the debtor, in the place of the contractor.

Stewart v. *Christy*, 325.

8. By the Mechanics' Lien Law of 1855, p. 327, it is required that the attested account of materials furnished should be left in the hands of the owner, in all cases, by the workman or material man, in order to bind the former.

Ibid.

9. Where an agreement had been entered into between parties, to ship flour from Cincinnati to New Orleans, to be sold for a profit, and it appeared that such agreement had originated in a conversation, in which one of the parties urged, as a reason for the safety of such a transaction, the fact of his having English orders in hand, into which he could put the flour in case the market should have declined, on its arrival at New Orleans, to a point that would pay no profit—*Held:* That there is nothing necessarily immoral in such an agreement, within the meaning of Articles 1887 and 1889 of the Civil Code. *Nevins* v. *Chapman*, 353.

CONTRACTS (*Continued*).

10. The arrest of a fugitive, and his delivery from another State into the hands of the Marshall here, is a consideration sufficient in law to be the basis of a legal obligation. *Murray* v. *Kennedy*, 385.

11. In a suit to cancel a contract, where it would require a liquidation between the parties in order to ascertain their respective rights, the plaintiff is not bound to refund what he has received, before he can be allowed to institute his action. *Millard* v. *Farley*, 518.

12. Where there has been an active violation of a contract, the creditor is under no obligation to put the debtor in default in order to entitle him to his action to cancel. *Ibid.*

13. In order to establish a valid contract, it should appear that the offer was not only seriously made, but accepted.
Vicksburg R. R. v. *Hamilton*, 521.

14. A contract to run a horse race is not prohibited by law, and money lost on such a race may be recovered by action in the courts. But such contracts, although permitted, are regarded with suspicion by the law, and the Judge is authorized to reject the entire demand, when the same appears to him excessive. *Grayson* v. *Whatley*, 525.

15. The obligation arising out of a contract to run a horse race, is hereditable between the heirs of the contracting parties. *Ibid.*

16. In all aleatory contracts permitted by our law, under Art. 2952 of the Civil Code, the personal qualities of the contracting parties must, more or less, form a material part of the motive to the contract, and the contract is not therefore assignable by one of the parties, without the consent of the other. *Ibid.*

17. An obligation which is absolutely null is not susceptible of confirmation or ratification; a new obligation to be substituted for it is necessary; and where the obligation is susceptible of confirmation or ratification, it is requisite that the acts relied on as being in confirmation or execution of the defective obligation, should have had in view and have been intended to supply the defects in the obligation which would render it null.
Decuir v. *Lejeune*, 569.

18. With regard to confirmatory acts containing an express ratification, and the voluntary execution importing a tacit ratification, the rules are the same so far as the substance is concerned; there is difference only respecting the burden of proof. *Ibid.*

19. The true consideration of a contract may always be questioned by one who was not a party to it, and who has an interest in showing that the consideration expressed was not the true one; and if such third party offers one who was a party to the act, to make such proof, the objection that this witness was a party, goes to his credibility, and not to the competency of his evidence. *Smith* v. *Conrad*, 579.

20. Articles 1795 and 1796 of the Civil Code, must be construed to mean, that the assent to a proposition, in order to be binding upon the proposer, must be made at once, without any intervening separation of the parties, unless an intention, on the part of the proposer, to grant time for con-

CONTRACTS (*Continued*).

sideration to the opposite party, appears evident, either, 1st, from the situation of the parties, or 2ndly, from the nature of the contract.
Boyd v. *Cox*, 609.

21. Article 1798 C. C. is not inconsistent with Article 1796; the former refers to the case stated in the Article preceding it, where one party proposes and the other assents, without an immediate signification of dissent from the proposer:—where the conversation or correspondence terminates with the assent of the party to whom the proposition has been made. But Article 1796 refers to its own immediate preceding Article (1795) and to the state of facts of that Article—to-wit, a proposition, an assent, and an immediate signification of change of intention on the part of the proposer. *Ibid.*

22. Where one partner in a commercial firm made a proposition to his co-partner, that he would either sell his own interest in the concern, on certain terms, or purchase that of such co-partner on the same terms, and the partner, to whom the proposition was made, failed to signify his assent at the time, but went off, and three days afterwards notified the proposer of his determination to purchase—*Held:* That an immediate signification of change of intention by the proposer released him from the obligation which he would have otherwise incurred, from his proposition, unless it appears from the situation of the parties, or from the nature of the contract, that it was the intention of the proposer to allow several days for reflection and decision upon his proposition. *Ibid.*

23. The rule, that such matters of defence as might have been pleaded on the merits, cannot form legal grounds for an injunction, in arrest of the execution of the judgment, finds an exception in cases of persons incapacitated from contracting generally or specially. As long as the disability lasts, a judgment obtained against them, under such circumstances, and which has not acquired the force of the thing adjudged, is liable to the same objection as the obnoxious obligation. *Médart* v. *Fasnatch*, 621.

24. Where one of two residuary legatees incurs an expense in protecting their joint interest, and the evidence shows that his act proved beneficial to both, justice requires that he should be reimbursed by his co-legatees to the amount of the expense incurred on his account.
New Orleans v. *Baltimore*, 625.

25. An employer is the sole judge of the competency of those whom he choses to employ; and so long as the employee is on trial, the employer has the right to determine for himself whether he possesses the proper qualifications and habits for his business. *Quirk* v. *Haskins*, 656.

26. A party should not suffer by an omission from the specifications of a contract, when those specifications were drawn up by the opposite contracting party. *White* v. *New Orleans*, 667.

27. Where a contract is entered into by one assuming to act as agent of another, without having been authorized to make the contract, such pretended agent is by law responsible personally in the precise terms of the contract.
Richie v. *Bass*, 668.

CONTRACTS (*Continued*).

28. Neither party to a contract can maintain an action for damages for its violation, without showing a readiness and ability to comply with his own engagement under the contract. *Moore* v. *Hopkins*, 675.

29. The obligation contracted by the vendor, to cause a mortgage resting on the property sold to be erased within a specified time, is a condition precedent to the collection of a note given for the price, and it is not incumbent on the vendee to put the vendor in default by a formal demand on him to erase the mortgage. *Walker* v. *Cucullu*, 689.

30. A letter considered as the evidence of an obligation, must be construed according to the ordinary rules of interpretation prescribed for contracts in general, and its contents determined by the meaning of the words in which it is written. *Janin* v. *Pontalba*, 691.

See MARRIAGE—*Rice* v. *Alexander*, 54.
See COMMON CARRIERS—*Williamson* v. *Dolsen*, 94.
See TUTORS AND TUTORSHIP—*Graham* v. *Hester*, 148.
See ACTION—*Whitesides* v. *McGrath*, 401.
See HUSBAND AND WIFE—*Hawkins* v. *Hays*, 615.
See NEW ORLEANS—*White* v. *New Orleans*, 667.
See STATUTES—*Baxter* v. *Sisters of Charity*, 686.
See SUBROGATION—*Shropshire* v. *His Creditors*, 705.

CORPORATIONS.

1. The ordinance of the city of New Orleans, approved April the 7th, 1858, relative to the assemblages of colored persons, free or slave, in violation of law, is not unconstitutional in its provisions.
African Church v. *New Orleans*, 441.

2. The Act of the Legislature of March 20th, 1850, entitled "An Act to amend the fourth section of an Act providing for the organization of certain corporations in this State, approved April 30th, 1847," is a mere legislative interpretation of the word "persons" in this Act of 1847.
Ibid.

3. Where a number of free colored persons had associated themselves together as a corporation, for purposes of public worship, and purchased property in their social capacity—*Held:* That although such a corporation has no legal existence, yet the members, considered as individuals, are entitled to their rights of property in what may have been acquired in the corporate name. *Ibid.*

See INSOLVENCY &c.—*Jeffries* v. *Belleville Iron Works*, 19.

COSTS.

1. Where a Sheriff has not been authorized as the legal agent of the seizing creditors, to insure property in his custody, he has no authority under the law to effect such insurance, and his claim for the return of the premium paid cannot be allowed as *costs of suit*. *Owens* v. *Davis*, 22.

2. The statutes of the State authorizing the municipal authorities, by whom the costs in criminal cases are paid, to regulate and fix the expenses in such cases, restrict them in respect to charges for the maintenance of prisoners. *Parker* v. *New Orleans*, 43.

COSTS (*Continued*).

3. Under the Act of 1856, the city of New Orleans has no greater power given to it in this respect; and the Sheriff of the parish of Orleans has the right, under the Acts of the Legislature, to charge thirty-seven and one-half cents for the daily maintenance of prisoners, and one dollar for turnkey's fees for each prisoner. *Ibid.*

4. Where the plaintiff partially succeeds in an injunction suit, he is entitled to recover the costs of suit. *Manning* v. *Ayraud*, 126.

5. Unless the tender is made in the form required by law, the plaintiff will not be liable, under the Act of 1839, for the costs of the provisional seizure issued before the maturity of the installments of rent.
Stillman v. *Bryant*, 175.

6. When an appeal has been taken from a judgment rendered in the District Court, pending the appeal, the Sheriff cannot, by an *ex parte* motion, obtain judgment and issue execution for his costs against the party cast; he should take a rule and notify the party before having his compensation fixed. *Decuir* v. *Lejeune*, 216.

7. Where it appears that no effort was made in the lower court to correct a supposed error in the judgment with regard to the costs, and the plaintiff has judgment for a part of his demand, the Supreme Court will not disturb that part of the judgment which awards him his costs.
Blanc v. *Cousin*, 294.

8. Where there is a reconventional demand, and both parties to the suit are cast, each must pay the costs of his own pleadings.
Peniston v. *Somers*, 679.

COURTS.

1. Where a Constable has seized property under a writ emanating from a Justice of the Peace, his possession is that of the law; he may protect his possession of the property seized by calling to his aid the judicial power, when needed; and when, by an order of a District Court, an attempt is made to deprive him of his possession, he is entitled to appeal from such an order, if the case be an appealable one.
State v. *Judge 5th District Court*, 34.

2. When an appeal in such a case is refused him, his remedy is not by a *writ of certiorari*. *Ibid.*

3. During the pendency of a suspensive appeal, the power of the District Court to order the sale of property is superseded, and such a sale would be void.
Smelser v. *Blanchard*, 254.

4. Where the court has ordered the sale of property on terms of credit, and it is sold for cash, the sale will be void for want of an order of sale.
Ibid.

5. The executrix being invested by law with powers of administration only, could not ratify a sale which was void for want of a proper order to sell.
Ibid.

6. The courts of this State are vested with an equitable jurisdiction in cases where the laws are silent. *Clarke* v. *Peak*, 407.

COURTS (*Continued*).

7. The Sixth District Court of the parish of Orleans has no jurisdiction in criminal matters, and is without authority to take a bond from a prisoner, upon an application for a writ of *habeas corpus*, even with the consent of the parties. Its jurisdiction is entirely civil, the whole criminal jurisdiction in the parish of Orleans being vested in the First District Court.
State v. *Branner*, 565.

8. The State is not entitled to judgment on a bond taken by the Sixth District Court of New Orleans in a criminal proceeding. *Ibid.*

See CRIMINAL LAW—*State* v. *Keeper of Parish Prison*, 347.
See OFFENCES AND QUASI OFFENCES—*Brainard* v. *Head*, 489.

CRIMINAL LAW.

1. Communications made by a prisoner to his counsel in the course of professional employment, and documents placed by him in the charge of his counsel, are not admissible as evidence against him in a criminal prosecution. *State* v. *Hazleton*, 72.

2. The Acts of the 6th of March, 1819, and the 14th of March, 1855, do not relate to the same subject-matter, there being no provision of law in the latter relative to stealing, inveigling, or carrying away slaves. The larceny punished by the 26th section of this statute is the common law offence, of feloniously taking and carrying away the personal goods of another. Slaves are not classed under our law as goods or personal chattels. The former Act is not, therefore, repealed by the latter.
State v. *Gore*, 79.

3. In the trial of slaves, Justices of the Peace do not act as jurors only, but as judges; and under the provisions of the statute, they are competent, after a mis-trial, to sit again in the case, until the prosecution be at an end. *State* v. *Bill*, 114.

4. Although the day fixed for execution by the magistrates before whom a slave has been tried for a capital offence has elapsed, pending an appeal, on the judgment being affirmed, it is the duty of the Sheriff to execute the sentence. *State* v. *Joshua*, 118.

5. Confessions made by an accused to the persons who arrested him, and who were not public officers, are not admissible in evidence against him.
State v. *George*, 145.

6. Confessions made under such circumstances are not admissible even when, in a case of larceny, the person to whom they are made is directed by the accused to the place where the stolen goods are to be found, and he finds them in the place designated; the fact of finding the goods may be taken into consideration by the jury, but not the admission of the accused that he had stolen and put them there; this fact must be collected from the circumstances of the case. *Ibid.*

7. It is not necessary, in charging an offence in an indictment, to follow the the words of the statute, it is sufficient if it be distinctly charged in other words. *State* v. *Butman*, 166.

8. Although the defendant in a prosecution for libel, may prove the truth of the charges that gave rise to the prosecution, yet evidence of common reports, or of publications in newspapers upon the subject, is inadmissible.
Ibid.

CRIMINAL LAW (*Continued*).

9. A party is just as much responsible, criminally and civilly, for giving currency to slanderous and libelous reports, and publications, as if he had originated them. His only excuse in such a case, is to show the truth of the charges preferred, and not the truth of the preferment, by others, of such charges. *Ibid.*

10. The extra-judicial declarations of the person against whom the libel was preferred, are not admissible in evidence, as the admissions of a party, he being merely a witness in the prosecution. It is otherwise in a civil suit, which the injured party may institute for the recovery of damages. *Ibid.*

11. When the defendant, for the purpose of discrediting the witness, offers to prove these statements, after directing the latter's attention to the fact that they had been made, the evidence is admissible. *Ibid.*

12. A motion in arrest of judgment lies only for defects apparent on the face of the record. *State* v. *Addison*, 185.

13. The 94th section of the Act of 1855, relative to crimes and offences, which punishes by fine and imprisonment the selling by retail of spirituous liquors without a license, is not repealed by the Act of 1855, relative to drinking houses, but is still in force. *State* v. *Parker*, 231.

14. The State is not bound to furnish the accused with a list of the talesmen as as they are summoned. *State* v. *Henry*, 297.

15. The Act, approved March 15th, 1855, entitled "An Act supplemental to an Act relative to crimes and offences, is not restricted in its application to bank officers, but embraces all classes of persons. *Burkett* v. *Lanata*, 337.

16. Proceedings under the Act of 1859 entitled "An Act relative to free persons of color coming into the State from other States or foreign countries," are of a criminal nature. *State* v. *Keeper of Parish Prison*, 347.

17. In criminal prosecutions, the Supreme Court is without jurisdiction, unless the offence charged be punishable with death, or imprisonment in the penitentiary, or a fine exceeding three hundred dollars has been actually imposed. And then there must be a final judgment before an appeal can be taken. *Ibid.*

18. In matters of *habeas corpus*, the jurisdiction of the Supreme Court is original, and not appellate. The original power to bail precludes the idea of the exercise of an appellate jurisdiction in relation to the same subject. *Ibid.*

19. Indictments need not describe the court before which they are found, nor the jurors by whom they are found, nor need they aver that the court has jurisdiction of the offence. *State* v. *Marion*, 495.

20. The caption to indictments is here uniformly dispensed with. *Ibid.*

21. A mistake in an indictment, as to the parish for which the Grand Jury was empanneled and sworn in, is not a ground upon which to quash. *Ibid.*

CRIMINAL LAW (*Continued*).

22. The State has a right to the presence of a party indicted for a felony, and he has no right to be heard in a motion to quash, while he is absent and a fugitive from justice—his surety on a bail-bond cannot, therefore, be heard on this subject. *Ibid.*

23. The rule that the defendant must not be charged with having committed two or more offences in any count of the indictment, does not apply to cumulative offences denounced in the same statute. *State* v. *Markham*, 498.

24. The prosecution for keeping a banking-game, or banking-house, is governed by the prescription of one year. *Ibid.*

25. It is not necessary that the State should prove the dealing of Faro several times, in order to show a violation of the statute: once will be sufficient. *Ibid.*

26. To keep a house where a banking-game is carried on, as well as to keep a banking-game, is an offence under the statute: there is no real difference between keeping a banking-house where money is bet or hazarded, and keeping a house where a banking-game is carried on. *Ibid.*

27. Where the Judge, in his charge to the jury, does not state nor recapitulate the evidence, so as to influence their decision on the facts,—nor state, nor repeat to them the testimony of any witness, nor give them any opinion as to what facts have been proved or disproved, the charge is not liable to the objection, that it touched upon the facts. *Ibid.*

28. The imprisonment allowed, in default of the payment of any fine imposed by a sentence of the court, cannot exceed one year. Acts 1855, § 4. *Ibid.*

29. The State's attorney, in a public prosecution, is entitled to the opening and *the close* of the argument, although the prisoner offers no evidence. *State* v. *Millican*, 557.

30. A juror cannot be heard to impeach the verdict which he has rendered. He is not allowed to prove the misconduct of his fellow jurors, nor to show that they erred in the formation of their verdict, either by disregarding or misconstruing the charge of the Judge. *Ibid.*

31. In a criminal prosecution, no defect of form, either in the proceedings or in the indictment, however apparent on the face of the papers, will be a good ground for a motion in arrest of judgment. *Ibid.*

32. The offence of willfully or maliciously setting fire to, and burning a crib of corn, falls within the provisions of the 3d section of the Act approved March 18th, 1858, entitled "An Act to amend and reënact certain sections of an Act entitled "An Act relative to crimes and offences," approved March 14th, 1855. *Ibid.*

See CONSTITUTION—*State* v. *Gutierrez*, 190.
See WITNESS—*State* v. *McDavid*, 403.
See EVIDENCE—*State* v. *Simon*, 568.
See JURISDICTION—*Ney* v. *Richard*, 603.
See JURIES AND JURORS—*State* v. *Walters*, 648.
See SLAVES AND STATU LIBERI—*State* v. *Solomon*, 463.

CURATOR.

See HUSBAND AND WIFE—*Woodward* v. *Woodward*, 162.
See APPEAL—*Langley* v. *Burrows*, 392.

DAMAGES.

1. Damages will not be allowed against a party for asserting a right in a court of justice by the compulsory process allowed by law, beyond the damages actually sustained, unless the circumstances of the case disclosed a want of probable cause for the action, and malice in the resort to compulsory process. *Carter* v. *Tufts*, 16.

2. Where one slave kills another, the merits of the quarrel between them, and the fact of the slave killed being the aggressor, are immaterial, and will not be noticed in the decision of an action brought by the owner of the slave who was killed against the owner of the slave who killed him, for the value of the slave killed. *Maille* v. *Blas*, 100.

3. The proof of the loss is sufficient to fix the liability in a case of this kind. *Ibid.*

4. Where an act authorized by law gives rise to damage, it is *damnum absque injuria*. *Barbin* v. *Police Jury*, 559.

5. Where excessive damages are awarded by a jury for an injury received, they will be reduced by this court. *Benagam* v. *Plassan*, 703.

See ATTACHMENT—*Hyde* v. *Higgins*, 1.
See AGENT AND AGENCY—*Ducongé* v. *Forgay*, 37.
See SHIPPING—*Pousargues* v. *Steamer Natchez*, 80.
Hunter v. *Bennett*, 715.
See OFFENCES AND QUASI OFFENCES—*Knight* v. *Opelousas Railroad*, 105.
Jenkins v. *Opelousas Railroad*, 118.
Perrine v. *Planchard*, 133.
Bogel v. *Bell*, 163.
Howes v. *Steamer Red Chief*, 321.
Burkett v. *Lanata*, 337.
Beverly v. *Steamer Empire*, 432.
Wallace v. *Miller*, 449.
Trudeau v. *Jackson Railroad*, 717.
See CONTRACTS—*Rizan* v. *Prescott*, 112.
Moore v. *Hopkins*, 675.
See INJUNCTION—*Campbell* v. *Oliver*, 183.
See MALICIOUS PROSECUTION—*Laville* v. *Biguenaud*, 605.
See SEQUESTRATION—*Broxton* v. *Bloom*, 618.

DEDICATION TO PUBLIC USE.

See PUBLIC THINGS—*Burthe* v. *Fortier*, 9.

DEFAULT.

See CONTRACTS—*Hill* v. *Penny*, 212.
Millard v. *Furley*, 518.
Walker v. *Cucullu*, 689.
See SALE—*Abels* v. *Glover*, 247.
See PRACTICE—*Vicksburg R. R.* v. *Barksdale*, 465.

DEPOSIT.

See SALE—*Brother* v. *Cronan*, 256.
See OFFENCES AND QUASI OFFENCES—*Hills* v *Daniels*, 280.

DEPOSITION.

1. Where an objection was made to the introduction in evidence of certain depositions, upon the ground that they were not reduced to writing by the Justice of the Peace before whom they were taken, and that the proces-verbal of the magistrate did not state by whom they were reduced to writing—*Held:* That the presumption of law is, that the magistrate did his duty, and that the answers were written either by himself or by a per-

DEPOSITION (*Continued*).

son not interested in the event of the suit, and that the burden of proof was on the party objecting to rebut this presumption.

Imboden v. *Richardson*, 534.

2. It is sufficient, in the execution of a commission to take testimony, if the caption and proces-verbal shows that the witnesses were duly sworn, and where, when and by what authority the commission was executed, and it is not necessary that it should appear by whom the deposition was written.

Blair v. *Collins*, 683.

See EVIDENCE—*Fulse* v. *Kittridge*, 222.
See CONTINUANCE—*Tarlton* v. *Bringier*, 419.

DIVORCE.

See HUSBAND AND WIFE—*Lauler* v. *Mast*, 593.

DOMICIL.

1. The fact that a person has voted in this State, and even become a candidate for the Legislature here, is not sufficient to show a change of domicil from another State, if it be proved that he never made a permanent change in his residence. *Mandeville* v. *Huston*, 281.
2. Where a party has removed from one parish into another, and has acted in the latter parish in such a manner as to manifest sufficiently his intention to change his domicil, but has not made a formal declaration to that effect, if a year has not elapsed since his removal, it is optional with a party desiring to sue him to bring the suit in either parish.

Berry v. *Gaudy*, 533.

3. If a person wishes to protect himself from being sued in the parish from which he removes, he should make an express declaration of his intention to change his domicil. *Ibid.*
4. The act of residence does not alone constitute the domicil of a party, but it is the fact of residence coupled with the intention of remaining permanently which constitutes it. *McKowen* v. *McGuire*, 637.

See JURISDICTION—*Landis* v. *Walker*, 213.

DONATIONS.

1. Where it is charged that the legatee was the concubine of the testator, such a legacy being in contravention of public policy, the legal heirs of the testator will be permitted to prove an illicit connection between the deceased and the legatee. *Philbrick* v. *Spangler*, 46.
2. An olographic will written in *pencil* is valid. *Ibid.*
3. A decree of a Probate Court ordering a will to be executed does not amount to a judgment which is binding on those who were not parties to it, and when the will thus probated is offered as the title, in virtue of which property is claimed or withheld, its validity may be inquired into collaterally. *Abston* v. *Abston*, 137.
4. A will in the nuncupative form made in the State of Mississippi, and attested by only three witnesses, in the absence of any evidence with regard to the laws of the State where it was made, will be, in this State, declared invalid. *Ibid.*
5. Where a man married a second time, while his first marriage was undissolved, and the second wife in contracting the marriage acted in good faith—*Held:* That at his death, the lawful wife and the wife *de facto* will

DONATIONS (*Continued*).

be each entitled to one-half of the community, and the children born of each marriage, entitled as legitimate children and heirs-at-law to succeed to the separate property of their deceased father, in equal parts, as if they had been born of the same marriage. *Ibid.*

6. A disposition in a testament, having for its object the foundation and maintenance of colleges under the administration of a municipal corporation, as trustee forever, is a prohibited *fidei commissum* and substitution.
Perin v. *McMicken*, 154.

7. As personal property has no *situs*, Article 483 of the Civil Code, which declares that persons who reside out of the State cannot dispose of the property which they possess here in a manner different from its laws, will not apply to such personal property as, at the death of the testator abroad, happens to be within our territorial limits. *Ibid.*

8. The trust estates of the common law were intended to be prohibited under the general term of *fidei commissa*. *Ibid.*

9. The right of the *cestui que trust*, under the common law, cannot be assimilated to the usufruct under our law. *Ibid.*

10. The absence of interest in the trustee will not take the trust out of the prohibition of our Civil Code. *Ibid.*

11. A bequest vesting a merely legal or apparent estate in a person, to be preserved and returned to his children and grandchildren, with the obligation upon such person, during his possession, to apply the fruits and revenues of the property devised to the benefit of a third person, who is neither owner nor usufructuary in the sense of the Louisiana law, constitutes a *fidei commissum* reprobated by that law. *Ibid.*

12. The will of *H. S.* contained the following dispositions, to-wit: "*Item* 1*st.*—*I give and bequeath my entire estate, of all and every description, to my children and their representatives, it being my wish that the same should be divided among them in the manner pointed out by law, subject to and under the conditions hereinafter expressed.*" "*Item* 2*d.*—*It is my will and wish that my entire estate, in the event of my wife,* Margaret S. Skipwith, *surviving me, shall be kept and worked together, as it now is, and managed and controlled by her; and that no partition of the same be made among my heirs until the youngest of my children I shall leave surviving me shall have arrived at the age of majority, or become emancipated by marriage, unless my wife should die previously thereto; in which event the partition may take place at her death: my said wife to enjoy the usufruct of my share of the community during her life, as is provided by law; and the net revenues of my separate estate during the time the same shall remain together and undivided, to be divided equally among my said children and heirs.*" It was shown that at the death of the testator he had no separate property—*Held:* That the true construction of the will is, to consider it as leaving the usufruct given by the Act of 1844 undisturbed, and as keeping the property in a state of indivision for the longest period allowed by law, viz, for five years. *Held* also: That the right conferred by the will, of keeping the property together and working the same, implies an accountability on the part of the widow and executrix for the crops only.
Succession of Skipwith, 209.

DONATIONS (*Continued*).

13. Where a testament purporting to be of the olographic kind, is not entirely written by the testator, it is null. *Williams* v. *Hardy*, 286.

14. Where a party enters into a second marriage, children of the first surviving, he is incapable of giving to his intended spouse more than one-fifth of his estate in usufruct. *Ibid.*

15. Where it is shown that an act of donation was not simulated, but a real contract entered into between the parties, and carried by them into effect, the judgment creditors of the donor cannot disregard this transfer and proceed *by execution*. *Johnson* v. *Alden*. 505.

16. The will of a party contained a clause, by which more than the disposable portion of his property was to belong to his wife during her natural life, to use or dispose of as she thought best, either in her lifetime or at her death for her benefit and the benefit of their children—*Held:* That the tenure of the widow under this clause, is not that of an usufructuary, and that such a disposition of property is at variance with the provisions of the Code respecting the legitime. *McCutcheon* v. *McCutcheon*, 511.

17. The tenure of the children, as heirs under such a clause, is not one recognized by our laws, and must be considered as not written. The will is, in that respect, null and void. *Ibid.*

18. The distinction which is recognized between fraudulent and simulated contracts,—limiting in the former case the creditor defrauded to a direct action in revocation, and in the other instance allowing the creditor to seize the property at once,—obtains in regard to donations. *Ibid.*

19. The settled construction of Article 1520 of the Civil Code is, that a reservation of the usufruct to the donor of immovable property renders the entire donation radically null, and not simply the illegal reservation of the usufruct. *Martin* v. *Martin*, 585.

20. A clause in a will, dispensing an usufructuary from making an inventory or giving security, is valid. *Breaux* v. *Carmouche*, 588.

21. But if the usufructuary undertakes to make an inventory, he must make an accurate one. *Ibid.*

22. A donation of immovable property made by a man to his concubine, is, under the prohibition contained in Article 1468 C. C., radically null and void, and not susceptible of ratification or confirmation. Such a contract being absolutely nuil, all parties interested, such as all the heirs of a deceased party who has made such a donation, have a right to set up this nullity for the purpose of defeating the fraud practised upon the law. This right is not confined to the forced heirs only. *Lazare* v. *Jacques*, 599.

23. In suing for the property illegally donated, the heirs are not required to produce a counter-letter, but are allowed to prove the violation of the law by every species of evidence oral as well as written. *Ibid.*

24. Decision in the case of *F. H. Fink et al.* v. *Executor of J. D. Fink*, 12 An., affirmed. *Fink* v. *Bullerdieck*, 624.

25. The interpolation of words accidentally omitted in a will, made in the nuncupative form by public act, cannot be considered as an interruption or turning aside to other acts. *Carter* v. *McManus*, 627.

DONATIONS (*Continued*).

26. Where a person, acting under a power of attorney which did not contain the power to donate, made a donation *propter nuptias*, which donation was ratified by the principal after the marriage had taken place—*Held:* That this act of ratification was not a constitution of dowry after marriage; for every ratification relates back to the time of doing the act or making the contract ratified. *Baines* v. *Burbridge*, 628.

27. Where the evidence shows that an act of sale was intended as an act of donation, and it is clothed with the formalities required by law for the validity of donations *inter vivos*, effect will be given to it as a donation. *Harper* v. *Pierce*, 666.

28. The will of *N. H.* contained the following clause: "*I give, devise and bequeath to the legitimate children of my son* Anthony, *who may be living at the time of his death, and the legal descendants of such as may previously die, in such portions as my son* Anthony *may by deed or will appoint, and in default of such appointment, in equal portions, the descendants of any deceased child taking but one share, all the lands, slaves and movable effects belonging to me in the parish of Madison, in the State of Louisiana, or which may be thereon at the time of my death; and I appoint my son* Anthony *guardian of his said children, and will and require that he shall manage and control said lands, slaves and movable effects to the best advantage of said children, and with the income thereof provide for the genteel support and liberal education of said children and their descendants, according to his judgment and discretion. I further will and devise, that, as such of said children shall arrive at the age of twenty-one years, or marry, that said* Anthony *shall set apart and give the usufruct of a portion of such property to such child, to such amount as he may deem just, after which he shall not be accountable for the receipt or disbursement of the income of such property, so set apart, nor for the support of the child so advanced. I wish it well understood, that if* Anthony *should die before his children arrive at the age required by this will to take charge of the property, in that case, I wish my executors to take charge of every species of property herein mentioned for my son* Anthony's *children, and act according to this will. Also, I give and bequeath to* Anthony's *children, at his death, all that plantation on which he now resides, in Adams County, which I purchased from* William P. Grayson *and others, and all the slaves and personal effects which may be permanently settled thereon and under his control at the time of my death. I wish it well understood, that all the property mentioned in this will for my son* Anthony's *children, goes to them and their descendants forever."*—*Held*: That the interest of *Anthony's* children depended on the previous demise of their father, and the title did not vest in the children or descendants of *Anthony* at the death of the testator, and that the disposition was a prohibited substitution. *Hoggatt* v. *Gibbs*, 700.

29. A disposition in a will, which is reprobated by law, such as a substitution, is not susceptible of confirmation or ratification. *Ibid.*

30. Conditions inserted in donations, which are contrary to law or to morals, are reputed not written. *Ibid.*

See Slaves and Statu Liberi, *Bateman* v. *Frisby*, 58.
See Husband and Wife—*Atkinson* v. *Atkinson*, 491.
See Sale—*Carter* v. *McManus*, 641.
See Collation—*Hoggatt* v. *Gibbs*, 700.

DOWRY.

See MARRIAGE—*Fleytas* v. *Her Husband*, 62.
See DONATIONS—*Baines* v. *Burbridge*, 628.

ELECTION.

1. An incumbent of an office who has been defeated by another, in an election for the same office, and contests the right of his opponent, will be responsible to him for the fees of the office pending the contest, should it be decided that such incumbent had no right or claim to hold such office.
Petit v. *Rousseau*, 239.

2. The Act of the Legislature entitled "An Act relative to elections in the parish of Orleans," approved March 19, 1857, is free from all constitutional objections. *State* v. *Giffin*, 420.

3. Where an election was contested upon the ground, that after the commissioners had made their return they proceeded to count the votes over again and found that there was a difference which would have changed the result—*Held:* That where it does not appear that the mistake was committed on the first, any more than on the second counting, full effect must be given to the official returns of the commissioners.
Ramsey v. *Callaway*, 464.

See CONSTITUTION—*State* v. *New Orleans*, 354.

EMANCIPATION.

See SLAVES AND STATU LIBERI—*Bateman* v. *Frisby*, 58.
Foster v. *Mish*, 199.

EQUITY.

See COURTS—*Clarke* v. *Peak*, 407.

ESTOPPEL.

1. Where the averments in a petition amount to an acceptance of a succession, the plaintiff is estopped from contesting a valid title derived from the person to whom he succeeds; he is the warrantor of the title.
McQueen v. *Sandel*, 140.

2. The probate of a will does not estop a legal heir from disputing any of its dispositions, or demanding of the courts an interpretation of the same.
Succession of Skipwith, 209.

3. An heir will not be relieved from the obligation of collating a debt due by him to his ancestor, on the ground of prescription acquired after the opening of the succession. *Ibid.*

4. Where a creditor has treated with the transferree of his debtor's property, as the real owner, he will be estopped from contesting the validity of the sale. *Ross* v. *Pritchard*, 531.

5. An application made by the executor named in the will, to have the will probated, is not a judicial admission which would estop the executor from claiming as his own, property disposed of in the will.
Carter v. *McManus*, 676.

See MARRIAGE—*Summerlin* v. *Livingston*, 519.
See MARRIED WOMAN—*Baines* v. *Burbridge*, 628.
See ACTION, PETITORY—*Girault* v. *Zunts* 684.

EVIDENCE.

1. In an action for damages, evidence is inadmissible to prove damages of a different character from those set forth in the pleadings.
Roberts v. *Hyde*, 51.

2. In a suit brought on a special contract, evidence may be received to prove the value of the work or labor performed under the contract; but the plaintiff is not entitled to a judgment for more than the stipulated price, as his claim is based on the contract, and not on a *quantum meruit*.
Lacroix v. *Tournillion*, 69.

3. Entries on the books of an insolvent, when they are shown by witnesses to have been made in good faith, and at the time they purport to have been made, and most of them for matters within the knowledge of the witnesses, are admissible, and sufficient to correct an error made by the syndic in his tableau of distribution. *Hernandez* v. *His Creditors*, 87.

4. It is not necessary that the contract of affreightment should be in writing, and parol evidence of any special agreement is, therefore, admissible.
Roberts v. *Riley*, 103.

5. A copy of an assignment under private act which is in existence, and under the control of the party in whose favor it is made, is not admissible in evidence. *Gaines* v. *Page*, 108.

6. Parol evidence is not admissible to explain receipts, where the receipt itself is the only legal evidence of *a contract* for the sale of real estate, and where the effect of the parol proof would be to substitute a parol agreement for the sale of an immovable, in the place of the receipt.
Young v. *Cook*, 126.

7. Parol evidence is admissible to prove the contents of an instrument of partition, after the opposite party has been served with notice to produce the missing document, if in his possession, and after the loss of it has been advertised in a newspaper and an affidavit made by the party offering to introduce it, that he has not been able to find the document after diligent search. *McQueen* v. *Sandel*, 140.

8. A party interrogated on facts and articles may state any facts intimately connected with the subject of the interrogatories, and necessary to an explanation of part of his answer. *Tegarden* v. *Powell*, 184.

9. The evidence of one witness, who simply declares that an account sued on, and over five hundred dollars, is correct, without giving his reasons for this assertion, is not sufficient to authorize the confirmation of a default;
Kentgen v. *Jordan*, 219.

10. A party who has violated his contract to erect buildings for another is not entitled to exact a specific performance, but can only claim the value of his work and materials. *McClure* v. *King*, 220.

11. A deposition of a witness residing out of the State, taken under commission, which was issued without the necessary affidavit, should not be received in evidence. *Folse* v. *Kittridge*, 222.

12. In a petitory action brought by the administrator of the husband's estate against the widow, for slaves which she has in her possession and claims as her paraphernal property, parol evidence is admissible to prove that she possessed the slaves prior to her marriage, as owner.
Bordelon v. *Dumartrait*, 227.

EVIDENCE (*Continued*).

13. Where an instrument was attested by two witnesses, and afterwards acknowledged by the parties before the Parish Judge, when no witnesses were present—*Held:* That it was not an authentic act, and the copy was inadmissible in evidence, until an effort had been made in vain to obtain the original. *Carpenter* v. *Featherston*, 235.

14. When the suscribing witness to an act under private signature, resides out of the State, proof of the genuineness of the signature of the party to the act, and of the absent subscribing witness, should be received preparatory to the introduction of the act in evidence. *Ibid.*

15. An uncertainty in the description of the property sold forms no objection to the admissibility of the act of sale in evidence. *Ibid.*

16. An objection to an act under private signature, offered in evidence, that it has no date except that of the day when it is offered, goes only to the effect of the evidence. *Ibid.*

17. A party seeking to recover must make his claim certain, it is not sufficient to render it probable. *Mummy* v. *Haggerty*, 268.

18. Where a party intends to avail himself of a decree as an adjudication upon the subject-matter in controversy, and not merely to prove collaterally that the decree was made, he must show the proceedings upon which the decree was founded, the whole record which concerns the matter in question ought to be produced. *Clark* v. *Hébert*, 279.

19. A copy of an Act of the Legislature of another State cannot be properly authenticated without having affixed to it the seal of the State. *Commonwealth Insurance Co.* v. *Labuzan*, 295.

20. Where it was sought to make parties liable for the price and debts of a boat, as owners, under a title derived from the plaintiffs at a certain period—*Held:* That evidence of a different title could not be received. *Shaw* v. *Noble*, 305.

21. A variance in the bill of sale as to the names of the vendors, is a variance in the substance itself, and will exclude it as evidence. *Ibid.*

22. Where it is sought to prove payment of a promissory note, it is not necessary that the note be annexed to the commission, in order to prove payment by the answers of the witness, whose depositions are to be taken. *Forbes* v. *Fahrmer*, 319.

23. Plaintiff having ignored the existence of a note, and sued for the stipulated price of property sold, cannot, where the defence is that the note was taken up by defendant, insist upon the production of the note. *Ibid.*

24. Where a party had given his note, payable to bearer, and secured by mortgage, and upon suit being instituted upon it by a third party, had set up as a defence the want of consideration, and for the purpose of throwing the burden of proving the consideration upon the plaintiff, offered in evidence a notarial act passed between himself and the original holder of the note, wherein the receipt of the money was acknowledged, the loss of the note recited, reference made to the newspaper in which the loss was pub-

EVIDENCE (*Continued*).

lished, and the Recorder was authorized to erase the mortgage—*Held:* That such an act was *res inter alias acta* as to plaintiff, and the recital therein contained could not be established by the instrument.

Hughes v. *Carey*, 348.

25. The rule, that parol evidence cannot be received to contradict a written acknowledgment of indebtedness, is subject to exceptions, and in the present case it was held that, under the circumstances, such evidence was admissible. *Watson* v. *James*, 386.

26. Full effect is given by the Supreme Court to evidence received in the inferior courts without objection. The party against whom evidence is offered, the introduction of which might be resisted, must object at the time it is presented, and if his objections are overruled, take a bill of exceptions. *New Orleans* v. *Congregation Dispersed of Judah*, 389.

27. In a suit to recover damages on account of a seizure made without any warrant in law—*Held:* That the plaintiff, having in vain endeavored to obtain the original writ of seizure, was authorized to prove, by secondary evidence, its issuing and the action of the Constable under it.

Saloy v. *Leonard*, 391.

28. The second section of the Act of 1855 authorizes commissioners, appointed in other States by the Governor of the State of Louisiana, to take the acknowledgment and proof of any deed, mortgage, &c.; and the 8th section gives to all acts thus acknowledged the force and effect of authentic acts executed in this State. The commissioners are thus vested, by express provision of law, with all the powers of our Justices of the Peace and Notaries. When an act of sale, mortgage, assignment, &c., is passed before a commissioner, therefore, it requires two witnesses in order to make it authentic, otherwise it is an act under private signature.

Langley v. *Burrows*, 392.

29. Where the evidence of a deputy notary was introduced to explain a certificate of protest, and its admission was objected to—*Held:* That, where the verity of the certificate is assailed, it is legitimate to use the statements of this witness to rebut the charge.

Manouvrier v. *Marvel*, 396.

30. Where plaintiff sought to hold defendant liable for money lent, and defendant's books were offered in evidence, in which all the entries were made by plaintiff, as his book-keeper, during the defendant's absence from the country—*Held:* That unless defendant objected to the entries on his return, and had his books corrected by counter entries, he will be presumed to have acquiesced in those made, and they will bind him.

Didier v. *Augé*, 398.

31. Where money has been expended in carrying on another person's business, he is bound to account for the same, although some other party may have held his power of attorney. *Ibid.*

32. In a redhibitory action, where the plaintiff was allowed without objection to prove by parol and his own letter, that he had made a real tender of a slave which he had purchased, to his vendor; that such vendor had received back the slave, and that he promised to return the money—*Held:*

EVIDENCE (*Continued*).

That such proof has, as to the vendor, the same effect that a written act of retrocession would have had. *Morris* v. *Kendig*, 404.

33. Where parties undertake to disturb third persons in the possession of real estate acquired at public sale, at a time when the pretensions of such parties were either unknown or considered as wanting in validity, they must make their case legally certain. *McConnell* v. *New Orleans*, 410.

34. A party seeking to recover property from a third person, as belonging to the community, should establish the marriage as conclusively as any other fact. *Ibid.*

35. The supposition and belief of a witness are not admissible in evidence; but the witness may state the facts from which such inference may be drawn by the court. *Ibid.*

36. The Act of 1858, which declares that parol evidence shall not be received to prove any promise to pay the debt of a third person, will have no application to a case in which it is proved that the promise was made prior to the passage of that Act, that the testimony was received without objection and related to a bill of exchange upon which it was sought to hold the defendant responsible. *Taylor* v. *Smith*, 415.

37. A certificate of proceedings before the Court of Ordinary in the State of South Carolina, where the Judge acts as clerk of his own court, is good evidence before our courts, under the Act of Congress, when such certificate has the seal of the court, is certified by the clerk, and the same person, in his capacity of Judge, declares the attestation to be in due form. *Pagett* v. *Curtis*, 451.

38. In a petitory action to recover property, the defendant cannot object to the introduction in evidence of the answers to interrogatories, upon the ground that the plaintiff, at the time of the service of the interrogatories, alleged ownership simply, without setting forth the particulars of the title so as to enable him to make a cross-examination of the witnesses, when the petition and such interrogatories sufficiently informed the defendant of their object. *Ibid.*

39. In a petitory action, it is sufficient, prior to the call in warranty, to make service of interrogatories upon defendant. Defendant cannot object to their introduction in evidence against him. *Ibid.*

40. Copies and sworn extracts from mercantile books, although received without objection, do not make proof of the items of a merchant's account. *Byrne* v. *Grayson*, 457.

41. In a suit brought by a merchant on an account-current, the proof of the fact that he was the factor of the defendant, and that he (the defendant) had given him his promissory note in part payment of the balance of the account, does not prove such balance, where defendant's answer contains a general denial, and a special averment, that at the time he signed the note he had not examined the accounts of plaintiff against him; such an answer imposes upon the plaintiff the burden of proving the items of account objected to and under consideration. *Ibid.*

EVIDENCE (*Continued*).

42. It is not sufficient for a party on whom the burden of proof rests, to make out a probable case, he must show by legal testimony, with reasonable certainty, the existence and verity of his demands. *Ibid.*

43. A charge of eight per cent. interest in an account-current of a merchant, cannot be recovered without proof in writing of an agreement to pay it. *Ibid.*

44. Where the destruction of an instrument is shown by direct testimony, the oath of the party is not required by Article 2258 of the Civil Code. *Weaver* v. *Cox*, 463.

45. It is only necessary, by Article 2259, that the loss of an instrument be advertised within a reasonable time, and this may be done in a proper case as well after, as before suit is brought. *Ibid.*

46. Where the paper is shown to have been destroyed, no advertisement is required. *Ibid.*

47. Where the defendant does not ask for security against the future appearance of an instrument alleged to have been lost, the plaintiff is not bound to furnish it. *Ibid.*

48. Parol evidence, although inadmissible to establish title to land, is yet admissible to prove fraud practised in the transfer of land. *Garrett* v. *Crooks*, 483.

49. Although a witness does not recollect the whole conversation of a party, he may nevertheless be allowed to testify to what he does recollect. Any objection to testimony on this score goes to the effect, and not to the admissibility of the evidence. *Ibid.*

50. Although the grounds of an exception be vaguely and indefinitely set forth, yet where they are sufficiently certain to apprise the plaintiff of the nature of the legal bar intended to be pleaded against his demand, evidence is admissible to sustain them. *Holmes* v. *Dabbs*, 501.

51. Where an administrator's bond has been lost, and its existence and genuineness fully established, and it is shown that the administrator, who gave the bond, was the clerk of the court, and as such the legal custodian of the bond—*Held:* That it is not necessary, in such a case, to advertise its loss, as required by Art. 2259 of the Civil Code. *Cox* v. *Bradley*, 529.

52. Testimonial proof is inadmissible to establish title to a slave by virtue of a sale—the evidence should be in writing. *Barbin* v. *Gaspard*, 539.

53. Parol evidence is admissible to establish simulation in a title to slaves. *Smith* v. *Lambeth*, 566.

54. A party claiming title to property under a Sheriff's sale is permitted to introduce in evidence the record of the suit in which the *fi. fa.* issued, and in which the Sheriff's sale to such party took place; and the fact, that the Sheriff's sale was not followed by registry, is not sufficient reason to exclude the record. *Ibid.*

55. Where a party brought suit to recover slaves, claimed to have been purchased by the defendant at Sheriff's sale, from the same vendor under

EVIDENCE (*Continued*).

whom plaintiff claimed title, and plaintiff offered to prove the verbal statements of the defendant, showing that he (the defendant) had purchased these slaves for the contingent benefit of the seized debtor's wife and children, or of the debtor himself—*Held:* That, as the introduction of such testimony would be an attempt to establish title to slaves by parol, and would also be foreign to the issue in the cause, it is, therefore, inadmissible. *Ibid.*

56. Evidence of the voluntary confession made by a prisoner to the officer having him in his legal custody, is admissible. *State* v. *Simon*, 568.

57. All confessions made by a prisoner, except when they have been obtained by duress or through inducements or promises, are legitimate evidence, whether made to private individuals or to persons in authority. Such is the common law rule, and even our statutes provide that the voluntary declaration of the accused before the committing magistrate is evidence. *Ibid.*

58. Parol evidence is admissible whenever the obligation is one contracted *in fraudem legis:* it is immaterial what form may have been given to the reprobated contract. *Lazare* v. *Jacques*, 599.

59. Art. 2257 of the Civil Code, requiring corroborating circumstances, in addition to the testimony of one witness, where the contract is for a sum exceeding five hundred dollars, relates in express terms to the proof of contracts which are not reduced to writing. *Collins* v. *McElroy*, 639.

60. An American Consul at a foreign port is without authority to make an authenticated copy of a draft drawn here by the owner of a ship, upon the consignees of such ship at such foreign port. *Williams* v. *Crescent Ins. Co.*, 651.

61. Where a judgment has been rendered, declaring the sale made by a debtor of his property to be simulated, the record and judgment will be received as full and conclusive proof of simulation. *Bowman* v. *McElroy*, 663.

62. Where one of the parties to a suit has more means of knowledge concerning a matter to be proved than the other, the *onus probandi* is on him. *Ibid.*

63. Where a paper was offered in evidence, purporting to contain a dispatch received at a telegraph office, and no proof was made that it was in the handwriting of any person employed in the telegraph office at the time the dispatch purported to have been received, and no other proof of its authenticity was given—*Held:* That it was inadmissible as evidence. *Richie* v. *Bass*, 668.

64. Evidence is inadmissible to establish payment or compensation of a debt, unless specially set up as a defence to the action. *Ruhlman* v. *Smith*, 670.

65. In a suit upon a due bill, where there was a variance between the initials of the name with which the bill was signed, and the allegation of the petition as to the name of the person by whom the bill was drawn—*Held:* That a judgment of non-suit should be rendered, unless the plaintiff amend

EVIDENCE (*Continued*).

his pleadings, or at least adduce proof of the fact that they were the same person. *Hereford* v. *Lake*, 693.

See BILLS OF EXCHANGE, &c.—*Martin* v. *Donovan*, 41.
See COMMON CARRIERS—*Roberts* v. *Riley*, 103.
See OFFENCES AND QUASI OFFENCES—*Knight* v. *Opelousas Railroad*, 105.
Beausoleil v. *Brown*, 543.
See CRIMINAL LAW—*State* v. *George*, 145.
State v. *Butman*, 166.
See SIMULATION—*Davis* v. *Stern*, 177.
Carrollton Bank v. *Cleveland*, 616.
See PLEADING—*England* v. *Gripon*, 304.
Rugely v. *Gill*, 509.
See MARRIAGE—*Succession of Taylor*, 313.
See PRACTICE—*Robertson* v. *Fullerton*, 318.
See NEW ORLEANS—*Webber* v. *Gottschalk*, 376.
See MALICIOUS PROSECUTION—*Blass* v. *Gregor*, 421.
See ATTACHMENT—*Simons* v. *Jacobs*, 425.
See INTEREST—*Bonner* v. *Copley*, 504.
See SALE—*Barbin* v. *Gaspard*, 539.
Carter v. *McManus*, 641.
See EXECUTORY PROCESS—*Taylor* v. *Pearce*, 564
See INTERROGATORIES—*Lapène* v. *Riche*, 612.
See REDHIBITION—*Paty* v. *Martin*, 620.
See INSURANCE—*Parker* v. *Union Ins. Co.*, 688.
See DEPOSITION—*Imboden* v. *Richardson*, 534.

EXECUTION OF JUDGMENT.

1. Where the plaintiff in execution is the purchaser of property sold under execution of a judgment subsequently reversed on a devolutive appeal, he is obliged to restore the property itself, and place the defendant in the same condition he would have occupied if no such judgment had been obtained against him. It is a proper case for the *restitutio in integrum*.
Graham v. *Eagan*, 97.

2. Judgments of courts, as well as deeds and acts of parties, may be carried into effect by inquiries, outside the decree, deed or act, when there is a mere latent ambiguity. *Lea* v. *Terry*, 159.

3. A distringas against the plaintiff is not the proper mode of executing such a judgment; as no other person is ordered by the judgment to do the work, it must be done by the Sheriff, as executive officer of the court.
Avery v. *Police Jury*, 223.

4. A stipulation in a contract, that the property of the debtor shall be sold without appraisement, in the event of non-payment at maturity, is a pact which ought not to be recognized by a court in the decree rendered upon such contract. *Levicks* v. *Walker*, 245.

5. A party having issued an execution against his judgment debtor, may propound interrogatories to a garnishee, where the object of the proceeding is to ascertain whether he has money or other funds in his hands belonging to the debtor; under such circumstances, it is not necessary that the plaintiff should resort to the revocatory action.
Shaughnessy v. *Fogg*, 330.

6. Where a party enjoins a seizure, upon the ground, that the judgment under which it issued is null and void, because it was rendered and signed at

EXECUTION OF JUDGMENT (*Continued*).

chambers, he should deny under oath that either he or his counsel consented to the submission of the case to the Judge to be decreed at chambers, before he attempts to avail himself of the omission of the clerk to enter such submission upon the minutes of the court, or complains that it was not reduced to writing and signed by the parties and their counsel.
Rust v. *Faust*, 477.

7. The signature of the Judge affixed by consent, in vacation, is a sufficient authentication of a decree in an ordinary action to authorize an execution.
Ibid.

8. The uniform practice is to issue executory process on decrees rendered and signed at chambers. *Ibid.*

9. Where it is shown that a party depends entirely upon his trade as a printer and editor for means of support, his printing press and materials necessary for the exercise of his trade are exempt from seizure under Art. 644 C. P.
Prather v. *Bobo*, 524.

10. The tools and instruments, exempted from seizure by law, must be *necessary* and *not merely convenient* for the exercise of the trade by which the debtor gains a living. *Ibid.*

11. Where the proper mode of executing a judgment is by a writ of possession, there is no necessity for mentioning in the decree, that such a writ shall issue. *State* v. *Bondy*, 573.

12. The difficulty of executing a judgment, because of uncertainty in the decree, is no concern of the Clerk; his duty is to issue the writ in the manner pointed out by law. *Ibid.*

13. In executing a writ of possession, the Sheriff is bound to consult the petition and the reasons for judgment, if necessary to explain what is uncertain in the decree; and he will be responsible in damages to the plaintiff, if he neglect or refuse to execute the judgment, if practicable with those explanations. *Ibid.*

14. At a Sheriff's sale of real estate, according to the terms of the sale, as announced and entered on the Sheriff's books, the credit price of the sale was to bear six per cent. interest per annum to maturity, and eight per cent. eventual interest; the purchasers having given their notes to bear eventual interest only, the Sheriff, some time afterwards, took a rule upon them to show cause why they should not comply with the terms and conditions of the sale as announced—*Held:* That after the Sheriff had made a sale of the property, executed the deed, delivered the notes of the purchasers to the party entitled to them, and returned the writ into court, he was without further interest in the controversy, and consequently, the rule taken by him could not be maintained. *Succession of Caldwell*, 617.

See SALE, JUDICIAL—*Nicholls* v. *Mercier*, 370.
See WARRANTY—*Haynes* v. *Courtney*, 630.

EXECUTORS AND ADMINISTRATORS.

1. Testamentary executors, after being finally discharged by a judgment from their trust as such, have no authority to institute a suit to enforce provisions of the will. *Rost* v. *Doyal*, 180.

EXECUTORS AND ADMINISTRATORS (*Continued*).

2. Where an administrator has placed a debt upon his tableau, and made full proof of it, he cannot be permitted, in the absence of proof of error, to question the truth and competency of the evidence adduced by him in support of the correctness of the tableau, when the heirs seek to make him personally liable, on his failure to collect the debt.

Serret v. *Labauve*, 186.

3. The joinder of the heirs in the prayer for the homologation of a tableau, is not a waiver of their rights against the administrator for his mal-administration in not proceeding to collect a debt at an earlier date, which was prescribed at the time it was placed on the tableau. *Ibid.*

4. The regular mode of ascertaining the extent of the personal liability of an executor for acts of mal-administration, is by opposition to the account of administration when rendered, and a personal action by the creditor against the executor, cannot be carried on so long as an opposition to the account on the same grounds remains undisposed of. *Cooper* v. *Cotton*, 214.

5. A foreign administrator, who has qualified in a court of competent jurisdiction, has the right to sue for property brought into the State, belonging to the succession which he administers.

Crawford v. *Graves*, 243.

6. The appointment of a judicial factor or administrator, by a foreign court of justice, confers no power upon such judicial factor to act in Louisiana, upon the simple registry of the decree of the foreign tribunal for his appointment. *Henderson* v. *Rost*, 405.

7. An administrator *pro tempore* of an interdicted person cannot bind the interdict for the payment of any specified amount, in order to effect a liquidation of partnership affairs. *Espinola* v. *Blasco*, 426.

8. Under our law, the widow in community may purchase from the succession of her husband, of which she is administratrix, and, in the absence of proof to the contrary, it will be presumed that the law of any other State is the same upon this subject as our own. *Pagett* v. *Curtis*, 451.

9. The surety on an administrator's bond cannot object to the return of *nulla bona* on a writ of *fi. fa.*, on the grounds that the Sheriff made his return after the return day of the writ had passed. *Soldini* v. *Hyams*, 551.

10. A judicial bond must be construed by reference to the law in pursuance of which it was given; and where no particular amount is expressed in an administrator's bond, the surety will be liable in the amount for which the law directs such a bond to be taken, to-wit, one-fourth beyond the estimated value of the movables, immovables, and of the credits comprised in the inventory, and the fact of the inventory not having been filed when the bond was signed will not alter its effects. *Ibid.*

11. An administrator is bound to render an account of the interest received by him, as also of the revenues of the estate confided to him, when kept in kind beyond a reasonable time. *Ibid.*

12. An executor is never entitled to receive more than his commissions, which the law fixes as his exclusive remuneration, for services rendered in the mortuary proceedings. *New Orleans* v. *Baltimore*, 625.

13. Where the administrator of a succession is the surviving partner in com-

EXECUTORS AND ADMINISTRATORS (*Continued*).

munity of the deceased, he has the same right to purchase at a sale of the effects of the succession, as any disinterested third person has, and a purchase made by such administrator is as valid and binding on the heirs, whether minors, or of age, as if made by any third party.

Carter v. *McManus*, 641.

See ATTORNEYS-AT-LAW—*Succession of Sullivan*, 200.
See SUCCESSIONS—*Savage* v. *Williams*, 250.
See SALE—*Dugas* v. *Gilbeau*, 581.
See CITATION—*Carter* v. *McManus*, 676.
See ESTOPPEL—*Carter* v. *McManus*, 676.

EXECUTORY PROCESS.

1. In a hypothecary action to enforce a judicial mortgage, the certificate of the Recorder, that the judgment has been recorded in his office, has the same effect as evidence, when drawn up on a duly certified copy of the judgment, as it would have on a separate and distinct paper.

Taylor v. *Pearce*, 564.

2. The Recorder's certificate is only *prima facie* evidence of the facts stated in it, and if untrue, may be contradicted by proof. *Ibid.*

3. The right of action given by Art. 69 of the Code of Practice to the mortgage creditor against the third possessor of the mortgaged property, depends, first, on the giving of notice to the third possessor, of the "amicable demand," and secondly, on the *non-payment* of the hypothecary debt by the third possessor, for the space of ten days, to be computed from the date of the service of the notice. These two conditions must be accomplished, before a right of action can be completely vested in a mortgage creditor against the third possessor; and, consequently, any action instituted against the third possessor prior to the expiration of the ten days delay, is premature, and subject to legal exceptions. *Ibid.*

4. The law has not made it the duty of the Sheriff to serve notices of amicable demand in hypothecary actions, and however convenient the practice may be, he acts in such cases as a private individual, and must be called as a witness to prove his acts, and cannot certify to them in his official capacity for the purposes of evidence. *Ibid.*

See COMMUNITY—*Poutz* v. *Bistes*, 636.

EXPROPRIATION.

See CONSTITUTION—*Vicksburg Railroad* v. *Calderwood*, 481.
See ROADS AND LEVEES—*Vicksburg Railroad* v. *Hart*, 507.

FRAUD.

See SALE—*Miltenberger* v. *Burgess*, 8.
See HUSBAND AND WIFE—*Phelps* v. *Rightor*, 33.

GARNISHEE.

See ATTACHMENT—*Yale* v. *Whitmore*, 63.
See EXECUTION OF JUDGMENT—*Shaughnessy* v. *Figg*, 330.

HUSBAND AND WIFE.

1. Where the wife of an absconding debtor gives property in payment of a debt due by her husband, the law presumes that the property so given belongs to the community, and the act of the wife in giving the property in payment is a nullity, and the property attempted thus to be alienated by her is liable to attachment by the creditors of her husband.

Hart v. *Gottwald*, 13.

HUSBAND AND WIFE (*Continued*).

2. In a contest between a wife separated in property from her husband, and a judgment creditor of her husband, seizing property which she claims as belonging to her separate estate, when the creditor specially denies that the property seized was purchased with the separate funds of the wife, and alleges fraud and collusion between the spouses in obtaining the judgment of separation—*Held:* That in such case, the burden of proof is thrown on the wife to establish the validity of her judgment, and to show how she acquired the property in question. *Phelps* v. *Rightor*, 33.

3. Where a judgment obtained by the wife against the husband for a separation of property is attacked by the creditors of the latter, proof that the husband had received money after the marriage, belonging to his wife, is admissible, to show that the judgment was not rendered on the consent or admission of the husband. *Raiford* v. *Thorn*, 81.

4. The judgment of separation of property is valid, although the wife fails to prove, when attacked by creditors of the husband, that he was indebted to her in the full amount for which she obtained judgment against him. The creditor can only then contest the amount of her judgment. *Ibid.*

5. A judgment of separation of property between husband and wife is not rendered null and void for want of publication. *Ibid.*

6. Where the wife's execution against the husband was credited with the price of personal property of the husband—*Held:* That it was equivalent to a sale under the writ. *Ibid.*

7. Property acquired during the marriage, although purchased in the name of the wife, belongs to the community in the absence of proof that it was paid for out of the wife's paraphernal funds. *Pearson* v. *Ricker*, 119.

8. The husband, when appointed curator of his wife interdicted for insanity, is bound to give security for the faithful administration of her estate confided to his care. *Woodward* v. *Woodward*, 162.

9. A married woman is without power to file an answer and stand in judgment, without being authorized by her husband or the Judge; and a judgment by default rendered against her before she is so authorized produces no effect. *Rils* v. *Hamilton*, 182.

10. In a State governed by the common law, the title to personal property sold to the wife vests absolutely in the husband. *Quigly* v. *Muse*, 197.

11. At common law, the wife's estate being secured to her separate use by virtue of an ante-nuptial agreement does not confer the capacity to buy property and contract obligations that a married woman separated in property from her husband enjoys in Louisiana. *Ibid.*

12. At common law, all contracts not under seal are contracts by parol. *Ibid.*

13. Where a woman at the time of her marriage was in possession of certain lots, as lessee, upon which she had constructed houses, and derived a profit by sub-leasing them, and there was an agreement that at the termination of the lease it might be renewed—*Held:* That if by the marriage contract this continued paraphernal property, and was administered by her through her agents, and at its expiration the lease was renewed by her in her own

HUSBAND AND WIFE (*Continued*).

name, it remained, after renewal, paraphernal property, and was not liable for debts of the community. *Spalding* v. *Godard*, 277.

14. A married woman is not a public merchant within the meaning of the Code, unless she carries on a separate business from her husband. *Ibid.*

15. Where the husband of the plaintiff is not a party to the suit, his authorization to bring the suit should be shown. *Schewer* v. *Klein*, 303.

16. Where parties, who were married in this State, and had acquired during the marriage and their residence here, property in slaves, removed for a time to Mississippi, and while there entered into a *post nuptial* contract by which the slaves were conveyed to a trustee for the use and benefit of the wife, during her life, and after her death were to descend to the joint heirs of the husband and wife—*Held:* That after they again returned to this State to reside permanently, their rights must be determined by our law, the post nuptial contract disregarded, and the slaves will belong to the community. *McVey* v. *Holden*, 317.

17. Where a foreigner owned property in this State, and by the laws of his own country there existed no community partnership between husband and wife—*Held:* That, prior to the passage of the Act entitled: "An Act relative to the property of non-resident married persons in this State," a community would not exist here, his wife would not acquire a legal mortgage on his property in this State, and the law would accord none to his minor children. *Leech* v. *Guild*, 349.

18. Where it is sought to hold a married woman liable on her note, given with the authorization of her husband, it is incumbent on the party seeking to recover, to show that the contract enured to her separate advantage, or that it related to her trade, if she acted as a public merchant. *Bowles* v. *Turner*, 352.

19. Where the husband makes a sale of property, partly belonging to himself and partly to his wife, in which his wife joins him and declares that she gives and grants to the vendee "all and singular any rights, titles or privileges which she may have in her own separate right or otherwise, in and to the property mentioned in the act, and binds herself to maintain the validity of the act, it is a valid alienation of the wife's separate property and binding on her. *Henderson* v. *Fort*, 383.

20. Such a sale is binding on the wife, although by the express terms of the contract the price is made payable to the husband. The price of her property is still subject to her separate administration whenever she pleases to demand the same, even against the will of her husband. *Ibid.*

21. A donation from one spouse to the other, made during coverture, and without the forms of a donation *inter vivos*, is invalid. *Atkinson* v. *Atkinson*, 491.

22. Where a husband sold property to his wife, and the price was money and the labor of the wife's slaves, to which the husband was himself entitled—*Held:* That such an agreement is not within the protection of Art. 2421 of the Civil Code. *Ibid.*

23. Where a suit was brought by a surviving wife to recover a slave, upon the ground that the title of her deceased husband, under whose succession the

HUSBAND AND WIFE (*Continued*).

defendant claimed the slave, was invalid, since such slave, being her separate property, was sold by herself and husband to an interposed person, from whom he was the same day acquired by her husband—*Held*: That whether it be regarded as a sale to an interposed person, or not, the sale was ratified when the administrator of her deceased husband's succession filed his account and carried the price of the slave into the same, and the plaintiff claimed in his succession her marital fourth in the price of the slave. *Williams* v. *Springfield*, 535.

24. Where, by the marriage contract, the present and future property of the wife is constituted dotal, property belonging to successions devolving upon the wife as heir, after the marriage, will be regarded as the dotal property of the wife. *Decuir* v. *Lejeune*, 569.

25. It is proper, in deciding whether one single act of cruelty on the part of the husband towards the wife, is sufficient to entitle her to a separation from bed and board, to take into consideration the age, habits and mode of life of the parties. *Lauber* v. *Mast*, 593.

26. Although a wife fails in an action for separation from bed and board, she is nevertheless entitled to alimony during the pendency of the suit. *Ibid.*

27. In a suit to liquidate the rights of a wife against the estate of her deceased husband, although the evidence shows that her paraphernal property was administered by her husband, this fact is not sufficient to entitle her to a judgment for the value of such property. She may resume the administration of whatever of her paraphernal property may still exist in nature, but she is a creditor for the value of such only as may have been disposed of by him or for his benefit. *Daigle* v. *Crow*, 597.

28. The degree of violence and threats requisite, under Art. 1845 of the Civil Code, to invalidate a contract, is the same in regard to contracts between husband and wife, as in regard to contracts generally. *Hawkins* v. *Hays*, 615.

29. A general and special power of attorney given by a wife to her husband, from whom she is separated in property, is not sufficient to authorize him to bind her as a member of a commercial partnership, where it does not appear that she was ever a public merchant, or interested in any commercial house, nor that she ever took any part whatever in the concern for whose liabilities it is sought to make her responsible. *Rolling* v. *Bordenave*, 647.

See COMPENSATION—*Hanrahan* v. *Leclercq*, 204.
See EVIDENCE—*Bordelon* v. *Dumartrait*, 227.
See PLEADING—*Atkinson* v. *Atkinson*, 491.
See COMMUNITY—*Holmes* v *Barbin*, 553.

INJUNCTION.

1. Where the injunction is dissolved by rule, on the ground of insufficient security, the defendant is not precluded thereby from claiming, on the trial of the merits, a judgment for damages against the principal and surety on the bond. *Betts* v. *Mougin*, 52.

2. The Act of the Legislature of 1855, authorizing the court to allow damages on the dissolution of an injunction, applies to the case of an injunction where the Sheriff is only restrained from seizing specific property. *Ibid.*

INJUNCTION (*Continued*).

3. An injunction should be dissolved, with damages, when it has been taken out to enjoin the execution of an entire judgment, on the ground that the defendant is indebted to plaintiff in a sum bearing an insignificant proportion to the amount of the judgment. *Barrow* v. *Robichaux*, 70.

4. Where the plaintiff in injunction partially succeeds, and the equitable remedy of injunction has not been palpably abused, damages will not be allowed under the statute. *Raiford* v. *Thorn*, 81.

5. On the dissolution of an injunction restraining an execution on a twelve months bond bearing eight per cent. interest, damages can only be awarded at the rate of twelve per cent. *Campbell* v. *Oliver*, 183.

6. Where a party obtained an injunction to arrest the execution of an order of seizure and sale, without giving bond and security, as required by Articles 739 and 740 of the Code of Practice—*Held:* That, the injunction being dissolved, the party against whom it was wrongfully obtained is entitled to recover from the party obtaining it five per cent. damages on the amount of the judgment enjoined. *Witkowski* v. *Selby*, 328.

7. The existence of an incumbrance on property sold, for a less amount than an installment of the price which has become due, justifies only the suspension of the payment to the extent of the incumbrance, to which extent the injunction should be limited. *Walker* v. *Cucullu*, 689.

8. Where previous to the obtaining of an order of seizure and sale for the price secured by mortgage on the property sold, the vendee had commenced an action of *quanti minoris* against the vendor, which if successful would absorb the amount of the executory demand—*Held:* That an injunction against the order of seizure and sale should be perpetuated without prejudice to the eventual rights of the defendant in injunction. *Ibid.*

9. The vendees of a tract of land enjoined an order of seizure and sale sued out to enforce the payment of notes due by their vendors to his vendor, and secured by mortgage on the property. The petition for injunction stated that the vendors of the plaintiff became parties to the suit, and adopted the allegations of the petition.—*Held:* That plaintiff's vendors could not be considered parties to the suit, as they had neither taken the oath, nor given the bond required by law to obtain an injunction. *Chambliss* v. *Miller*, 713.

See PRINCIPAL AND AGENT—*Denson* v. *Stewart*, 456.
See PRACTICE—*Ross* v. *Pritchard*, 531.
See SERVITUDE—*Barrow* v. *Landry*, 681.

INSOLVENCY AND INSOLVENT PROCEEDINGS.

1. Where a creditor seeks to have annulled, as alleged, an order of court accepting a surrender of property by an insolvent, the proper method is to proceed by direct action in the same court which rendered the order contradictorily with the ceding debtor, and also with the creditors, by notice to the syndic elected by them. *Jeffries* v. *Belleville Iron Works Co.*, 19.

2. A corporation created under the Act for the organization of corporations for works of public improvement and utility, approved March 14th,

INSOLVENCY AND INSOLVENT PROCEEDINGS (*Continued*).

1855, cannot avail itself of the provisions of the Act relative to the voluntary surrender of property, approved March 15th, 1855. *Ibid.*

3. The laws with regard to the surrender of property are merely remedial; in such cases the law of the forum governs. *Brent* v. *Shouse*, 110.

4. Under our jurisprudence, a surrender made out of the State, of property situated here, cannot have any binding effect. *Ibid.*

5. A surrender of property, made by a debtor in another State, does not make his debts due and exigible here, so as to relieve the creditor who seeks to attack the property in this State, from the necessity of swearing that he is about to remove such property out of the State before the falling due of his claim, as required by Art. 242 C. P. *Ibid.*

6. Where the claim of a creditor making opposition to a tableau of distribution has been dismissed by a judgment of nonsuit, he may, when another tableau is filed, prove his claim, and demand to be paid, out of the funds to be then distributed, such an amount as will place him on a par with the other ordinary creditors who had partaken in the former distribution. *Allinet* v. *His Creditors*, 130.

7. A creditor of an insolvent, whose indebtedness preceded the surrender of the insolvent, may plead his debt in compensation of any amount due by him to the insolvent. *Martin* v. *His Creditors*, 165.

8. An insolvent cannot recover from the syndic, tools of his trade, which he, of his own accord, permitted to be included in his schedule. *Bier* v. *His Creditors*, 167.

9. Where a party obtains judgment against his debtor, previous to his surrender, and has the same recorded after his debtor has obtained a stay of proceedings, such registry of the judgment does not give him a mortgage. His rights, in that respect, are fixed by the surrender, although his judgment has not been carried on the bilan. *Freeman* v. *His Creditors*, 397.

10. Where such a creditor has not been a party to the proceedings by which property seized and sold was subjected to the payment of the claims of other creditors, he cannot claim to be paid by preference out of the funds or proceeds so realized. *Ibid.*

11. Decision in the case of *Linton* v. *Stanton*, 4th An., affirmed. *Beach* v. *Miller*, 601

12. The validity of a decree by the United States Court, giving a discharge in bankruptcy to a debtor, under the Act of Congress approved August 19th, 1841, cannot be questioned, if the certificate has not been impeached for fraud, and the debt in question is not of that fiduciary class which is saved from the operation of the Act. *Ibid.*

13. Rights vested in creditors by a *cessio bonorum*, so far as they relate to the property ceded, are unaffected by subsequent proceedings of the insolvent, in causing himself to be declared a bankrupt under the Act of Congress of August 19th, 1841. But the 8th section, Art. 1st, of the United States Constitution, provides that Congress shall have the power to establish "uniform laws on the subject of bankruptcy throughout the United States;" this power was specially delegated to Congress, and only re-

INSOLVENCY AND INSOLVENT PROCEEDINGS (*Continued*).

served by the several States in so far, and so long as Congress did not see fit to exercise it. The moment Congress exercised the power, the State laws on the subject became inoperative, and were suspended. *Ibid.*

14. The syndic of an insolvent estate, in filing an account of his administration, must make an accurate statement of the active mass of the estate, and also of the passive mass; mention must be made of the privileges and mortgages, as well as the ordinary debts. *Shropshire* v. *His Creditors*, 705.

15. Where real property belonging to an insolvent estate was adjudicated to a certain person, and in consequence of his failure to comply with the terms of the first sale, the property was re-adjudicated to the same person for a lesser amount, and suit being brought against such purchaser for the difference in the prices of the two sales, the matter was compromised by his paying a certain amount, which fell short of the deficiency—*Held:* That this sum was due by him as part of the price which he had stipulated to pay for the property, and must therefore be classed on the syndic's tableau as the proceeds of immovable property. *Ibid.*

16. The fees paid by the syndic of an insolvent estate to counsel, for the prosecution or defence of suits for the estate, are entitled to be classed as law charges. But it is the duty of the syndic not to burthen the estate with onerous charges for the remuneration of such services, for they are paid on the hypothesis that they enure to the benefit of the estate. *Ibid.*

See SEQUESTRATION—*Tufts* v. *Casey*, 258.
See SIMULATION—*Sullice* v. *Gradenigo*, 582

INSURANCE.

1. Under a marine policy of insurance, there must be a technical total loss to entitle the insured to abandon the vessel, and when the insured have not the right to abandon, the captain cannot be considered as the agent of the insurers. *Hanau* v. *Louisiana Mutual Ins. Co.*, 201.

2. It is the proximate, and not the remote cause of the loss, which is to be regarded in order to ascertain whether the loss is covered by a policy of insurance. *Caballero* v. *Home Mutual Ins. Co.*, 217.

3. Where a fire occurs upon the premises insured, by which an explosion of gun-powder takes place, the insurer is responsible for the loss which is the direct consequence of the combustion. *Ibid.*

4. Where the fire did not happen at the premises insured, but broke out in a building about two hundred feet distant, causing the explosion of gunpowder, which by the concussion of the air injured the building insured against fire—*Held:* That such a loss could not have been within the reasonable intendment of the parties, and was not covered by the policy. *Ibid.*

5. The interest of a consignee, who has accepted a draft drawn against the freight, whether insured or not, is an insurable interest and a distinct matter from the interest of the captain and ship owners. The latter may, however, afterwards benefit by an insurance effected by the former, by assenting to the contract and making himself liable for the premium; but this is the result of a contract on his part.

Williams v. *Crescent Ins. Co.*, 651.

INSURANCE (*Continued*).

6. Where the consignor of a vessel effected an insurance on the freight, with the warranty "no other insurance," and the consignee, who had accepted a draft against such freight, without instructions from the consignor, effected another insurance on the freight at the place of destination—*Held:* That this last insurance could not be considered a violation of the warranty contained in the former. *Ibid.*

7. Where the Sheriff of Orleans, having a steamboat in custody, insured her "against harbor risks in the port of New Orleans," and she sank in port—*Held:* That in an action by the Sheriff to recover the amount of insurance, neither of the parties litigant being able to assign the specific cause of the disaster, the law will presume the unseaworthiness of the boat, and the burden of proof is on the owner to show the contrary.
Parker v. *Union Ins. Co.*, 688.

INTERDICTION.

1. By Articles 402 of the C. C. and 962 of the C. P., the law on the subject of tutorship is made applicable to the curatorship of interdicted persons in respect to many matters, and particularly in reference to the oath, the inventory and the security. *Interdiction of Rochon*, 6.

2. By this law, the District Judge is vested with a discretionary power in fixing the bond of a curator of an interdicted person, over a portion of the amount, which is to constitute the sum of the bond, and the law makes it his duty to embrace in the bond; 1st. An amount equal to the active debts; 2ndly. The money and other movable effects stated in the inventory; and, 3rdly. Such other sum as he shall deem sufficient to cover any loss or damages which the curator may occasion the interdicted person by mal-administration of his estate. *Ibid.*

3. The discretion vested in the District Judge, is a legal discretion, and may, in a proper case, be revised by the Supreme Court on an appeal; but if parties wish to question the exercise of this discretionary power by the District Judge, they should place on file testimony to show that the Judge was governed by an unnecessary caution towards the party giving bond, *Ibid.*

See EXECUTORS AND ADMINISTRATORS—*Espinola* v. *Blasco*, 426.

INTEREST.

1. The Act of the Legislature of the 9th of March, 1852, which allows legal interest on all debts from the time they become due, unless otherwise stipulated, does not apply to debts due before its passage.
Gordon v. *Zacharie*, 17.

2. An agent for the collection of money is only liable for interest on the money collected from judicial demand, unless it be shown that he employed the money for his own use, or that he was put in default prior to the institution of the suit. *Ibid.*

3. The Act of the 20th of March, 1856, entitled "An Act relative to the rate of interest" had in view the sale of notes and other written obligations, their discount or sale for the purpose of raising money, and nothing more. The words interest or discount, in the sense in which they are taken in the

INTEREST (*Continued*).

Act, are synonimous, meaning the percentage deducted on the sum expressed in the note or bond, &c. The provisions of the Act cannot be so extended as to authorize and legalize all transactions between debtors and creditors wherein usurious interest is added to the sum really due, as a consideration for an extension of time, or for the indulgence of the creditor. *Crane* v. *Beatty*, 329.

4. The penalty attached by the Act of 1855, to the charging of usurious interest, is a forfeiture of the entire interest contracted for. *Ibid.*

5. Where a judgment on a debt, arising *ex contractu*, decrees interest, but is indefinite as to the time when it commences to run, the interest decreed must be considered as commencing on the day that the suit was instituted. *Keenan* v. *Whitehead*, 333.

6. Parties are entitled to recover interest from their tutors upon the sums allowed to be due them, from the dates of their majority. *Guillet* v. *Juré*, 417.

7. By the Acts of 1852 and 1855, all debts bear interest, at five per cent. from maturity. *Weaver* v. *Cox*, 463.

8. In an action for the recovery of damages, interest cannot be allowed on the amount found by the verdict or judgment. *Bonner* v. *Copley*, 504.

9. And in an action on a bond for the recovery of damages, the rule is the same. *Ibid.*

10. In a suit on a sequestration bond, to recover damages for illegally suing out a writ of sequestration in a possessory action—*Held:* That interest could not be *allowed* on the items of damage found against the defendant. *Ibid.*

11. In such a suit, actual damages are all that the plaintiff is entitled to recover; and the opinions of witnesses cannot form the basis of a verdict. But the witnesses should testify to the facts within their knowledge, and from those facts the jury should find the actual damage sustained by the plaintiff. *Ibid.*

12. Attorney's fees are allowed as damages in cases of this character. *Ibid.*

13. In a suit to recover money paid in error, the plaintiff is entitled to five per cent. interest from judicial demand. *Smith* v. *Conrad*, 579.

See USURY—*Byrne* v. *Grayson*, 457.
See REDHIBITION—*Burnham* v. *Hart*, 517.

INTERROGATORIES ON FACTS AND ARTICLES.

1. Where interrogatories on facts and articles are not required to be answered in open court, nor to be sworn to before the Clerk, the answers sworn to before a Justice of the Peace and filed in court before the trial of the cause, cannot be objected to on the ground of their not being filed until after the day fixed in the order of court for their being answered. *Huff* v. *Freeman*, 240.

2. Interrogatories on facts and articles cannot be taken for confessed, and used as evidence on the trial, without an order of court directing them to be answered within a given delay, and notice of such order given to the party interrogated. *Lapène* v. *Riche*, 612.

INTERROGATORIES ON FACTS AND ARTICLES (*Continued*).

3. Where a defendant is interrogated by the plaintiff for the purpose of proving the liability or indebtedness set forth in the petition, and the defendant, in answering, states facts which tend to establish his liability, he may also in the same connection state other facts which show that such liability has been discharged. *Broxton* v. *Bloom*, 618.

4. Where a party to a suit, in answering an interrogatory on facts and articles, states some other facts besides those concerning which inquiry has been made, if such facts be matter of defence and closely linked to the facts on which the party was interrogated, the answer is admissible. *Woodruff* v. *Dodd*, 644.

5. Where the District Judge struck out such an answer, and, a bill of exception being taken, the Supreme Court admitted it in evidence—*Held:* That the case should be remanded in order to give the opposite party an opportunity to contradict it. *Ibid.*

6. A party to a suit, interrogated on facts and articles, may state, in addition to such matters as are intended to be elicited by the interrogatories, any other matters, by way of defence, provided they are closely allied to those facts sought to be drawn from the party by the interrogatories. *Quirk* v. *Haskins*, 656.

See EVIDENCE—*Tegarden* v. *Powell*, 184.

INTERVENTION.

See PRACTICE—*Gaines* v. *Page*, 108.
See PLEADING—*Union Bank* v. *Bowman*, 271.
See JUDGMENT—*Bowman* v. *McElroy*, 663.

JUDGMENT.

1. A decree rendered by the Vice Chancery Court of Mississippi, upon default, and without notice or citation, or appearance of the defendant, is absolutely void. *Morris* v. *Bailey*, 2.

2. A judgment appointing a tutor to a minor, rendered by a court of competent jurisdiction, cannot be attacked collaterly by a debtor of the minor; so long as the judgment stands unreversed, it constitutes a full warrant for the demand and collection of the debts due the minor, by the person named therein as tutor. *Succession of Gorrisson*, 27.

3. Such a judgment cannot be attacked, directly or collaterly, before any other court than the one by which it was rendered. *Ibid.*

4. It is only when the terms of a judgment are of doubtful construction, that resort may be had to the pleadings or to the reasoning for judgment adduced by the court in obedience to the constitution, *Avery* v. *Police Jury*, 223.

5. A judgment in these words, "*that the dam erected by plaintiff across the prong of the Bayou Paul, be torn down, and the prong be replaced in a state of nature,*" is not ambiguous. *Ibid.*

6. The declaration of the Judge in the judgment confirming a default, that two judicial days had elapsed from the date of the default, does not make proof of the fact when the contrary appears from the minutes of the court. *Deblanc* v. *Leblanc*, 224.

JUDGMENT (*Continued*).

7. Consent judgments decide nothing. *Michie* v. *Armat*, 225.

8. A judgment emancipating a minor cannot be attacked collaterally. *Johnson* v. *Alden*, 505.

9. An emancipated minor has not the right to donate his property. *Ibid.*

10. The nullity of such a donation is not however absolute, but relative; it is intended for the minors protection, and when he becomes of age, he may ratify or confirm the obligation. *Ibid.*

11. When such a contract is entered into with sincerity, while the emancipated minor might seek for protection from it on account of his legal incapacity to make such a donation *inter vivos*, yet creditors whose claims have sprung into existence since the donation was passed and executed, cannot avail themselves of this defect, where it is not a contract made in fraud of their rights, nor has proved injurious to them. *Ibid.*

12. In an opposition by a third party, to regulate the effect of a seizure in what relates to himself, he is bound to assert all his pretensions at the same time; and the judgment of the court in such proceeding, determining the rights of the creditors growing out of the seizure, cannot afterwards be disturbed on a new claim set up by such third opponent. *Bowman* v. *McElroy*, 663.

13. An award of arbitrators, when acquiesced in by both parties, has, as to them, the effect of a final judgment. *Peniston* v. *Somers*, 679.

14. A direct action of nullity is the only remedy to correct an error in an award of arbitrators once acquiesced in by the parties. *Ibid.*

15. A judgment must be construed with reference to the pleadings, and, when it admits of two constructions, that one will be adopted which is consonant with the judgment which should have been rendered on the facts and law of the case. *Ibid.*

See ACTION—*Jones* v. *Jamison*, 35.
See EXECUTION—*Graham* v. *Eagan*, 97.
See PRESCRIPTION—*Morton* v. *Valentine*, 150
See EXECUTION—*Lea* v. *Terry*, 159.
See TUTORS AND TUTORSHIP—*State* v. *Judge Second District Court*, 164.
See PRACTICE—*Jacobs* v. *Sauvé*, 424.
See COMMUNITY—*Holmes* v. *Dabbs*, 501.
See MARRIED WOMEN—*Baines* v. *Burbridge*, 628.

JURIES AND JURORS.

1. The decision in the case of the *State* v. *Ward*, re-affirmed, to the effect that the fact of a juror having made up his mind as to the punishment to be inflicted on the prisoner in case of a verdict of guilty, does not effect his competency. *State* v. *Bill*, 114.

2. It is sufficient for a party sued on a promissory note, to obtain a trial by jury, to swear that all the allegations in his answer are true, where want or failure of consideration are substantially set forth in the answer. *Frellson* v. *McDonald*, 536.

3. In criminal cases the verdict of the jury may be given orally, but whether returned orally, or in writing it must be recorded on the minutes in the English language. *State* v. *Walters*, 648.

JURIES AND JURORS (*Continued*).

4. The court cannot after the jury are discharged order the translation into English, of the record of their verdict, which was made in French.

Ibid.

See CRIMINAL LAW—*State* v. *Markham*, 498.
State v. *Millican*, 557.
See SIMULATION—*Carrollton Bank* v. *Cleveland*, 616.

JURISDICTION.

1. The right of creditors to privileges on property within our jurisdiction, must be determined by the *lex fori* and not by the *lex loci contractus*.

Owens v. *Davis*, 22.

2. The jurisdiction of the District Court is to be tested by the value of the thing demanded, and not by reference to extraordinary matters, although the same may be used by way of proof.

Taenzer v. *Judge 3d District Court*, 120.

3. If the matter in dispute be really under three hundred dollars, the Supreme Court cannot take jurisdiction by way of a writ of *certiorari*, any more than by a direct appeal, and Article 857 of the Code of Practice is so far inapplicable to it. *Ibid.*

4. A party who has sold all of his property in the parish where he resided, and removed from there permanently, may be sued in the parish to which he has removed, and it will be considered his domicil, even though he has made no permanent establishment there. *Landis* v. *Walker*, 213.

5. Where a note is secured by an act of hypothecation, which imports confession of judgment, the suit may be brought in the parish where the property is situated. *Scott* v. *Turner*, 346.

6. In a prosecution against a party for cruel treatment to a slave, the Justice of the Peace is without authority to place the slave beyond the reach or control of the master. That right or privilege is conferred upon the Judge and jury who try the prosecution for the cruel treatment. The Justice's Court is entrusted only with the preliminary investigation of the charge preferred; and beyond the duties of a committing magistrate, the Justice is without authority. *Ney* v. *Richard*, 603.

7. It is the duty of the District Judge, in such a case, on application for a *mandamus*, and upon a proper showing, to release the slave from imprisonment, without making the magistrate a party to the proceedings.

Ibid.

8. The jurisdiction of the Supreme Court over misdemeanors attaches only after the actual imposition of a fine exceeding three hundred dollars.

Ibid.

9. Where a slave had been ordered into the custody of the Sheriff by a Justice of the Peace, in a prosecution against a wife for cruel treatment—*Held:* That an application by the husband, as head and master of the community, to the District Judge for *a mandamus* against the magistrate, the keeper of the Parish Jail and the Sheriff, for the delivery of the slave, was not incidental to the criminal prosecution, and if the amount involved exceeds the sum of three hundred dollars, the Supreme Court has jurisdiction. *Ibid.*

JURISDICTION (*Continued*).

10. The Sheriff being a ministerial officer, cannot treat as a nullity a *mandamus* from the District Court, and in order to recover a slave in such a case as the above, the only remedy of the plaintiff is in a *mandamus*. *Ibid.*

11. The Act of 1855, "relative to landlords and tenants," gives jurisdiction of the actions therein specified to Justices of the Peace, whenever the monthly rent of the premises leased does not exceed one hundred dollars.
State v. *Third Justice of the Peace*, 660.

12. Where two parties entered into an agreement by which one of them leased to the other a certain lot of ground, upon which were two houses, at a rent of one hundred and twenty-five dollars per month, and upon the death of the lessor the two houses becoming the property of two distinct persons, one of them sought to eject the lessee by suit before a Justice of the Peace—*Held:* That such a lease could not be divided for the purpose of giving jurisdiction to the Justice's Court. *Ibid.*

13. The District Court of the place of opening a succession, according to law, is the proper court in which to institute a demand for administration.
Succession of Carney, 699.

See JUDGMENT—*Succession of Gorrisson*, 27.
See PRACTICE—*Webre* v. *Duroc*, 65.
See EXECUTORS AND ADMINISTRATORS—*Henderson* v. *Rost*, 405.
See DOMICIL—*Berry* v. *Gaudy*, 533.
See COURTS—*State* v. *Branner*, 565.
See PLEADING—*Billiu* v. *White*, 624

JUSTICES OF THE PEACE.

See CRIMINAL LAW—*State* v. *Bill*, 114.
See JURISDICTION—*Ney* v. *Richard*, 603.

LAND TITLES.

1. Where two separate and conflicting surveys of land had been made by the authority of the United States, the first of which had never been approved, but the parties had entered into a notarial agreement to respect it in preference to the last—*Held:* That the parties are bound by this agreement so long as it remains in force and has not been set aside by a direct action of rescission. *Dugas* v. *Truxillo*, 116.

See PUBLIC LANDS—*Fluker* v. *Doughty*, 673.

LETTING AND HIRING.

1. A party purchasing an unexpired lease, in the absence of proof to the contrary, is presumed to have purchased it, on condition of taking the premises in the situation they were at the time of the sale; and he has no claim upon his vendor for expenses incurred in restoring the premises to their original condition at the expiration of the lease. *Blache* v. *Aleix*, 50.

2. The goods or effects of the sub-lessee, found on premises that are leased, are only subject to the privilege of the lessor to the extent of the sub-lessee's indebtedness to the principal lessee; but when such goods are seized by the lessor for rent due him, and the sub-lessee does not disclose the title under which he occupies the premises, the privilege of the lessor will cover the goods for the whole amount of rent due.
Simon v. *Goldenberg*, 229.

See OFFENCES AND QUASI OFFENCES—*Beverly* v. *Steamer Empire*, 432.
See JURISDICTION—*State* v. *Third Justice of the Peace*, 660.

LIBEL AND SLANDER.

1. Where a party called another a rogue in the hearing of bystanders, in a moment of irritation, and in reference to his unwillingness to settle a debt due him, and no injury resulted from such transient expression of angry feelings—*Held:* That such a case of defamation is not actionable.

Artieta v. *Artieta*, 48.

2. Where a suit was brought for defamation of character, and defendant failing to answer, a judgment by default was made final without the intervention of a jury, on *ex parte* affidavits sworn to before the Clerk some days previous to the trial—*Held:* That a jury ought to have been empanneled to assess the damages, the witnesses ought to have been examined in open court on the trial, or their depositions, taken according to law, should have been offered in evidence. *Schewer* v. *Klein*, 303.

3. In a civil action for damages on account of libellous and slanderous charges, the defendant is allowed to plead in justification the truth of the slanderous, defamatory, or libellous words or matter; but if a party is instrumental in giving credence to a report of such a nature, he cannot screen himself by proof that there was such a rumor or report, or that the charges originated elsewhere. All persons concerned in the publication are guilty to the same extent. *Cade* v. *Redditt*, 492.

See Criminal Law—*State* v. *Butman*, 166.
See Offences and Quasi Offences—*Burkett* v. *Lanata*, 337.
See Malicious Prosecution—*Laville* v. *Biguenaud*, 605.

MALICIOUS PROSECUTION.

1. To maintain an action for a malicious prosecution, the plaintiff must prove: 1st. That he has been prosecuted by the defendant either criminally or in a civil suit, and the prosecution is at an end. 2d. That it was instituted maliciously and without probable cause. 3d. That he has thereby sustained damage. *Blass* v. *Gregor*, 421.

2. Malice is a principal ingredient in the offence, and its proof is indispensable as a prerequisite to a recovery. *Ibid.*

3. The proof of malice need not be direct, it may be inferred from circumstances; and the want of probable cause is presumptive evidence of malice, subject, however, like all presumptions, to be rebutted. *Ibid.*

4. An action for damages on account of a malicious prosecution, cannot be sustained, except on proof of malice in the defendant, and of want of probable cause for the prosecution of which plaintiff complains.

Laville v. *Biguenaud*, 605.

5. Actions of this sort have never been favored,—a clear case must be made out, of a perversion of the forms of justice to the satisfaction of private malice, and the willful oppression of the innocent, in order to sustain them. *Ibid.*

6. In an action for damages for a malicious prosecution, where the evidence shows that the defendant acted from motives of private interest, and without probable cause to support the prosecution, his action under the advice of counsel will not exempt him from liability.

Glascock v. *Bridges*, 672.

MANDAMUS.

1. On the hearing upon the return of the *mandamus nisi*, at least in cases against other than judicial officers, the relator may either rely upon the insufficiency of the return alone, or he may traverse the same by proof, without any formal answer, and thereupon the answer and the proof will be considered together. *State* v. *Lusitanian Society*, 73.

2. But he cannot, after having failed in one mode of trial, resort to the other. *Ibid.*

3. The decision of the case of *Simmons* v. *Judge of the Second District Court of New Orleans*, 13 An., 483, affirmed. *State* v. *Judge 2d District Court*, 113.

4. The proceeding by *mandamus* must be conducted in the name of the State, upon the petition and oath of the party entitled to relief; it cannot be demanded by way of answer to a suit brought to collect money. *Bishop* v. *Marks*, 147.

5. A *mandamus* is the proper remedy to compel a ministerial officer to perform a purely ministerial act. *Savage* v. *Holmes*, 334.

6. In an action for a *mandamus*—*Held:* That the order to show cause, on a certain day fixed by the court, the summary hearing of the grounds of objection and evidence, and the judgment decreeing a peremptory *mandamus* to issue, are in conformity to Articles 841, 842 and 843 of the Code of Practice. *Ibid.*

See EXECUTION OF JUDGMENT—*State* v. *Bondy*, 573.
See JURISDICTION—*Ney* v. *Richard*, 603.

MARRIAGE.

1. The presumption arising from facts which tend to establish the *status* of marriage is not conclusive, but subject to be rebutted by testimony negativing the fact of marriage. *Philbrick* v. *Spangler*, 46.

2. The declarations of the parties, to the effect that they had never been married, will, under certain circumstances, outweigh the presumption of marriage arising from the fact of the parties having lived together as man and wife, and having been publicly recognized as such. *Ibid.*

3. The law as it stood in regard to the contracts of married women, previous to the Act of the Legislature of 1855, entitled "An Act to enable married women to contract debts and bind their paraphernal and dotal property," remains unimpaired, with the difference, that a *married woman* taking the benefit of that Act, is placed on the same footing with a *femme sole*, her contract furnishing full proof against her; while under the general jurisprudence, those who deal with a married woman, are bound to see that the contract made with her enures to her benefit. *Rice* v. *Alexander*, 54.

4. An immovable bought with dotal funds is dotal. *Fleytus* v. *Her Husband*, 62.

5. Where the community has been waived, by the marriage contract, between husband and wife, the law does not, in that case, create the presumption that the property belongs to the husband. *Williams* v. *Hardy*, 286.

MARRIAGE (*Continued*).

6. Where a party offered in evidence, as proof of a marriage, solemnized in the State of Indiana, a certified copy duly authenticated, of the record of the marriage license and certificate of marriage of the minister who celebrated the same, from the County Circuit Court of the State, and at the same time offered the Revised Statutes of Indiana relative to "marriage" and to the "Clerks of the Circuit Court"—*Held:* That such testimony is admissible to establish the marriage. *Succession of Taylor*, 313.

7. Parol evidence is admissible to prove that the contracting parties to a marriage were in good faith, and that the marriage was consummated. *Ibid.*

8. A marriage celebrated between a free white person and a free person of color, in violation of Art. 95 of the Civil Code, is an absolute nullity. No suit is needed to declare the nullity of such a union. Either party may disregard it, and neither can pretend to derive from it any of the consequences of a lawful marriage. Such a marriage may be attacked collaterally and in every form of action in which it is set up against either of the parties. *Succession of Minvielle*, 342.

9. Where a marriage is null and void, no community can ever exist between the parties to it. *Summerlin* v. *Livingston*, 519.

10. Where a party legally married, before the dissolution of such marriage, contracts another, the latter contract is absolutely null, and is not susceptible of confirmation or ratification, whether express or implied. Nor is it necessary that a direct action be instituted for the purpose of setting it aside: its nullity may be demanded by way of exception or defence. *Ibid.*

11. In a suit for the settlement of the community, the surviving spouse may set up, for purposes of defence, the nullity of the marriage, arising from the fact that the deceased was, at the time of the marriage, legally married to another person; even though he was aware of her condition at the time of their marriage. A party cannot avail himself of his own turpitude as the basis of a demand; yet he is not estopped when he resorts to it for purposes of defence. *Ibid.*

12. The admission by a defendant, in his original answer, that he married the deceased, will not estop him from amending his pleadings, by alleging the absolute nullity of such a marriage. *Ibid.*

13. A marriage absolutely null may produce civil effects; but this takes place by special provision of law, and only in favor of the party who has acted in good faith, and in favor of the children born of the marriage. The contract itself has in other respects no vitality. *Ibid.*

See HUSBAND AND WIFE—*Raiford* v. *Thorn*, 81.
Pearson v. *Ricker*, 119.

MARRIED WOMEN.

1. Where a suit is brought upon a draft drawn by a married woman and her husband, the burden of proof is on the plaintiff to show that the draft is valid as to the wife. A party cannot be bound as surety for a debt which is not due by reason of a failure of consideration against the principal. *Adams* v. *Cuny*, 485.

MARRIED WOMEN (*Continued*).

2. A married woman may sue for damages arising *ex delicto*, where her husband is a party to the suit. *Cade* v. *Redditt*, 492.

3. Where a married woman confessed judgment upon a debt of her husband's, for which she had made herself surety by notarial act—*Held:* That such confession was but the complement or consummation of a contract which the law prohibits, and which was, consequently, null. *Baines* v. *Burbridge*, 628.

4. A married woman is not estopped, by confessing judgment, from afterwards denying that the debt enured to her benefit. *Ibid.*

See EVIDENCE—*Bordelon* v. *Dumartrait*, 227.
See HUSBAND AND WIFE—*Spalding* v. *Godard*, 277.
Bowles v. *Turner*, 352.
Henderson v. *Fort*, 383.
See MINORS—*Dugas* v. *Gilbeau*, 581.
See CONTRACTS—*Médart* v. *Fasnatch*, 621.

MINORS.

1. Where a party was appointed guardian to a minor by the courts of Mississippi, and subsequently removed to the State of Louisiana, bringing the minor with him, thereby changing the domicil of the minor, and obtained possession of the effects of the minor in a fiduciary capacity—*Held:* That even if the authority granted by the Mississippi courts terminated on his removal, he was yet responsible as a *negotiorum gestor*, and the minor was entitled to call him to account, and moreover had his tacit mortgage under Art. 3283 of the Civil Code. *Leverich* v. *Adams*, 310.

2. If the minor is entitled to his account, and if he has a tacit mortgage under a real statute, he must have an action here to enforce his rights. *Ibid.*

3. A party cannot be held liable for the notes and obligations of a firm, of which he became a member while a minor, and from which he withdrew before he was emancipated, when it does not appear that he had been benefited by the concern, nor that he had committed a fraud upon the plaintiff. *James* v. *Alford*, 506.

4. A married woman who is a minor, when duly assisted and authorized by her husband, as also any minor, who is duly represented by his tutor, is competent to stand in judgment in an action against the administrator of a succession, to set aside as absolutely null and void, the adjudication of property to himself while acting in the double capacity of auctioneer and administrator. *Dugas* v. *Gilbeau*, 581.

5. The rules which regulate the sale of the property of minors do not apply to sales of succession property made at the instance of administrators for the payment of debts, and consequently, the sale of succession property for the payment of debts may be made for less than the appraised value in the inventory, and such sale must be held valid and binding upon the minor heirs as well as upon heirs of full age; where a succession is accepted with the benefit of inventory, no law requires that the property shall produce its appraised value, nor that a re-appraisement shall be made in case the first estimation shall not be obtained. In such cases, sales made in the

MINORS (*Continued*).

manner provided by law for sales under execution, will be valid, if thus ordered and approved by a decree of the court.

Carter v. *McManus*, 641.

See TUTORS AND TUTORSHIP—*Interdiction of Rochon*, 6.
McWilliams v. *McWilliams*, 88.
Gaillard v. *Foster*, 121.
Graham v. *Hester*, 148.
White v. *Gleason*, 479.
Martel v. *Richard*, 598.

See JUDGMENT—*Succession of Gorrison*, 27.
Johnson v. *Alden*, 505.

See MORTGAGES—*N. O. Insurance Company* v. *Tio*, 174.
Guillet v. *Juré*, 417.

See PARTITION—*Savage* v. *Williams*, 250.
Gernon v. *Bestick*, 697.

See HUSBAND AND WIFE—*Leech* v. *Guild*, 349.

MONITION.

See TAXES, TAX SALES, &c.—*In the matter of Peyton Bond*, 129.

MORTGAGES.

1. A minor cannot claim a legal mortgage on the property of a person who interferes with the administration of his estate, unless the person so interfering was domiciliated in Louisiana, and the property within its jurisdiction. *New Orleans Ins. Co.* v. *Tio*, 174.

2. After the removal of a minor to Louisiana, through the agency of one who had intermeddled with the minor's estate abroad, a legal mortgage attaches to protect the minor against an unauthorized administration of his property situated here. *Ibid.*

3. Where property has been sold to satisfy a mortgage claim, as a general rule, the payment to the Sheriff will not exonerate the purchaser, for the latter is required to retain the balance in his hands in order to satisfy special mortgages of subsequent date. The Sheriff has no right to collect this surplus; but at the same time, if the funds are paid over to him, and he pays the special mortgage, the purchaser is thereby exonerated.

Cummings v. *Erwin*, 289.

4. On an application for a *mandamus* to compel the Recorder of mortgages to erase an inscription, all that is required is, that the parties in interest should have notice of the application, in order that their rights, where they have such, may be protected. *Savage* v. *Holmes*, 334.

5. The mortgage and privilege given by the Act of 1835, entitled "An Act to provide for the draining and clearing of the marshy grounds and cypress swamps situated between the city of New Orleans, its incorporated suburbs, and Lake Pontchartrain," does not create a mortgage or privilege with a potestative condition on the part of the property holders; the potestative condition was in favor of the Draining Company, and the Act of the Legislature by its terms declares, that "such privileges and first mortgage" shall take precedence over all other mortgages whatsoever, and *shall attach to the property.* *Ranney* v. *Burthe*, 343.

6. Where a party purchased certain lots of ground, in 1847 and 1850, situated within the Second Draining Section, and, after the drainage had been completed, the tax assessed, the tableau confirmed by a final judgment, and

MORTGAGES (*Continued*).

an order of seizure and sale issued upon the mortgage and privilege given by the Act of 1835 against the property, he paid the tax and brought suit against his vendor to recover the amount—*Held:* That in the absence of a special warranty against the mortgage and privilege of the Draining Company, the action cannot be maintained. *Ibid.*

7. Where a note, payable to order, and secured by mortgage, is transferred by endorsements, and sued on by the holder, it is unnecessary to allege the transfer of the mortgage in the petition, as the transfer of the note, which is an evidence of the debt, includes a transfer of the mortgage, which is the accessory of the debt. *Scott* v. *Turner*, 346.

8. Where a mortgage to secure a note is made in favor of the payee, or any holder of the note, a formal subrogation is unnecessary to enable the endorsee to enforce the mortgage. *Ibid.*

9. Where it is evident that an instrument in the form of a conditional sale was intended by the parties to be executed in the form of a common law mortgage, it will not be regarded as a sale. *Watson* v. *James*, 386.

10. One in whom the legal title to property in Louisiana is vested, subject to a trust created in favor of others by deed of trust executed in another State, has full power to mortgage the property. *Ibid.*

11. The qualities of mortgagee and owner of the same thing cannot exist in the same person at the same time. *Clarke* v. *Peak*, 407.

12. Although the purchase of property by the mortgagee extinguishes the mortgage, yet there is nothing illegal in the insertion of a condition in the sale, by which it is arranged that the price is not to be collected until the mortgage has been satisfied. *Ibid.*

13. The special mortgage, authorized by Art. 338 of the Civil Code, and by Act of the 11th March, 1830, has not the effect of annulling the anterior mortgage upon the property imposed by law for the security of the minor, even upon the property included in the special mortgage.
Guillet v. *Juré*, 417.

14. The effect of such special mortgage is simply restrictive and not destructive. *Ibid.*

15. A stock mortgage given to secure the payment of stock to a property bank is prior and superior to a loan mortgage, although given in the same act, or hypothecary contract with the corporation, and a sale of the property mortgaged, under a decree to satisfy the amount of the loan, will not extinguish the stock mortgage, unless the amount of the adjudication shall exceed the amount of the stock mortgage. *Haynes* v. *Courtney*, 630.

16. The rule requiring the re-inscription of mortgages at the expiration of ten years, does not apply to mortgages given by stockholders to the property banks to secure the amount of stock subscribed. *Ibid.*

17. A mortgage granted by the maker of a note to one who endorses the note for the maker's accommodation, to secure him against liability, is not an accessory to the principal obligation, but simply a personal indemnity depending on the payment of the note by the endorser.
Bowman v. *McElroy*, 646.

MORTGAGES (*Continued*).

18. The endorser, in such a case, would have no cause of action, until he had paid money on his endorsement; and the holder of the note, after judgment against the endorser, could claim no better right under the mortgage than the endorser possessed. *Ibid.*

19. A special mortgage, with the pact *de non alienando*, granted on a plantation, does not preclude the mortgagor from employing an overseer. *Scarborough* v. *Stinson*, 665.

See TUTORS AND TUTORSHIP—*State* v. *Judge 2d District Court*, 164.
See MINORS—*Leverich* v. *Adams*, 310.
See PRACTICE—*Elbridge* v. *Milling*, 513.
See SUCCESSIONS—*Poulz* v. *Bistes*, 636.
See CONTRACTS—*Walker* v. *Cucullu*, 689.
See INJUNCTION—*Walker* v. *Cucullu*, 689.
See ATTACHMENT—*Hunter* v. *Bennett*, 715.

NEW ORLEANS.

1. Where a contractor brought suit for the price of a banquet or side-walk made in front of defendant's property, pursuantly to a contract entered into with the city authorities, and it was contended by defendant that the plaintiff should be nonsuited, because he did not prove "that the petition for the paving of the side-walk was signed by one-fourth of the property holders," and "that the necessary publications, as required by the 119th section of the Act of 1856, were given,"—*Held:* That, in the absence of proof to the contrary, the city authorities will be presumed to have complied with the law in that respect: *omnia præsumuntur solemniter esse acta.* *Webber* v. *Gottschalk*, 376.

2. The eighth section of the city ordinance relative to markets, which provides for the ejectment of any person occupying any table, stand, or stall, without the consent of the farmer or collector of the revenues of the market, has reference to the original occupation of the stall, stand or table, by a person not previously in possession, but does not apply to the case of a party who obtained possession under a former collector, and has continued that possession since the lease of the revenues to the farmer who desires to eject him. *Douat* v. *Beombay*, 377.

3. All that the farmer has the right to require of a butcher, in the actual occupation of a stall in the market, is a conformity to the ordinances in relation to the mode of keeping the stall, and the punctual payment of the dues imposed by the ordinance. *Ibid.*

4. There is no warrant given by this eighth section of the ordinance for the summary arrest and imprisonment of a person refusing to deliver up a stall, upon demand. *Ibid.*

5. The compulsion spoken of in the concluding clause of this section, is a compulsion by legal process. *Ibid.*

6. The Street Commissioner has not the right to incur expenses for the purpose of cleaning the city, without the special authority of the Council. *Duggan* v. *New Orleans*, 449.

7. The city of New Orleans has by law the administration of the batture, and had, until the passage of the Act of 1853, the exclusive right of deter-

NEW ORLEANS (*Continued*).

mining when and to what extent the riparian proprietors might occupy the batture or alluvion, within the limits of the corporation.

Remy v. *Municipality No.* 2, 657.

8. The City Surveyor is without authority to make a contract for city work, which will be binding on the city, without pursuing the formalities required by law. But, if in the specifications of a proposed contract, submitted to public adjudication by publications in the newspapers, something has been inadvertently omitted which was absolutely necessary to the useful and proper completion of the work, the Surveyor's duty would be to require the contractor to perform such necessary incident of a good job, before delivering a certificate. *White* v. *New Orleans*, 667.

See TAXES, TAX SALES, &c.—*New Orleans* v *Southern Bank*, 89.
See CONSTITUTION—*State* v. *Gutierrez*, 190.
See ARREST—*Tujacque* v. *Weisheimer*, 276.
See MORTGAGES—*Ranney* v. *Burthe*, 343.
See CORPORATIONS—*African Church* v. *New Orleans*, 441.

NOVATION.

1. Unless it is expressly agreed, that a draft given is given in payment, it does not operate a novation of the debt. *Graham* v. *Sykes*, 49.

NULLITY.

1. To the action of nullity none can be parties, except those who were parties to the judgment sought to be annulled. *Winn* v. *Dickson*, 273.

2. Where a party suing to annul a judgment of partition, on the ground of error in the description of the owner of lands, is shown to have suffered no injury, and the execution of the judgment would not be against good conscience, and where it is not shown that there was fraud or ill practice on the part of him who sought such partition—but that the mistake complained of arose from the carelessness of the party suing to annul—*Held:* That such error in description is not a sufficient cause of nullity.

Ibid.

3. In order to annul a judgment, a direct action of nullity must be instituted in the same court which has rendered the judgment—but when an action is made the basis of another action in another court, the party sued may plead in defence nullity arising from the want of proper parties.

Clark v. *Hébert*, 279.

See TAXES, TAX SALES, &c.—*Woolfolk* v. *Fimbene*, 15.
See TUTORS AND TUTORSHIP—*Graham* v. *Hester*, 148.
See ATTORNEYS-AT-LAW—*Succession of Sullivan*, 200.
See MARRIAGE—*Succession of Minvielle*, 342.
Summerlin v. *Livingston*, 519.
See JUDGMENT—*Johnson* v. *Alden*, 505.
Peniston v. *Somers*, 679.
See DONATIONS—*Martin* v. *Martin*, 585.
Lazarre v. *Jacques*, 599.
See SALE—*McIlhenny* v. *Barbin*, 548.
See SALE, JUDICIAL—*McIlhenny* v. *Barbin*, 548.
Haynes v. *Courtney*, 650.

OFFENCES AND QUASI OFFENCES.

1. The rights, duties and obligations of the New Orleans, Opelousas & Great Western Railroad Company are created by express law, and until the Legislature shall by statute require them to enclose their road, or shall delegate the power to the parochial authorities, and they shall exercise the same, they will be under no obligation to enclose their road, or any part thereof, with fences or barriers. And if cattle stray upon the track and be killed or maimed by accident, it will be *damnum absque injuria*, and the owner will have the loss to bear.

Knight v. *Opelousas R. R.* 105.

2. In an action brought to recover the value of cattle killed on a railroad track by the cars, the plaintiff is as much bound to prove the fact of gross negligence and want of care on the part of the company or its agents, as he is to prove the fact of the killing. *Ibid.*

3. An action cannot be maintained by a railroad company against the owner of cattle, for damages occasioned by the cars coming in collision with the cattle on the road, while it remains uninclosed.

Jenkins v. *Opelousas R. R.* 118.

4. Although the absence of malice, in an act which has caused damage, is sufficient to prevent the recovery of vindictive or exemplary damages, yet in such a case special damages may be allowed.

Perrine v. *Planchard*, 133.

5. The Sheriff is only liable for such damages, arising in the discharge of his official duty, as shall be proved to have been actually sustained.

Bogel v. *Bell*, 163.

6. Where a factor, acting as the agent of another party, has employed a broker to make a purchase, and such broker, without seeing the merchandise, acknowledges a constructive delivery on a simple inspection of an entry in the books of the vendor and constituted depositary, it is such an act of imprudence as will render the factor liable for any loss that may occur from the bad faith of such vendor. *Mummy* v. *Haggerty*, 268.

7. Where the contract of deposit stipulates no reward for the preservation of the thing deposited, and the depositary acts at the request of the owner he is not bound to use more than ordinary prudence.

Hills v. *Daniels*, 280.

8. The proof of negligence on the part of a depositary is sufficient to render him liable for the loss of cash deposited with him; but in order to establish his liability for a draft that has disappeared, it is necessary that the depositor show some loss he has incurred by its disappearance.

Ibid.

9. The Act of Congress, entitled "An Act for the better security of the lives of persons on vessels navigated in whole or in part by steam," may be invoked, as the basis of a civil action, to remedy a private grievance or wrong, caused by a failure to comply with its provisions.

England v. *Gripon*, 304.

10. The neglect to provide the tackle, apparel and furniture required by law for the equipment of a vessel is the fault of the owner himself, and he is,

OFFENCES AND QUASI OFFENCES (*Continued*).

therefore, responsible to the master of a slave, hired on board his boat and lost through such neglect, for the value of such slave. *Ibid.*

11. The right of the owners of a boat to recover from their officers, through whose neglect damage has been done, the amount paid by them on account of such damage, is not prejudiced by the fact that instead of contesting the demand, they compromised it. *Brannan* v. *Hoel*, 308.

12. The pilot or any other officer of a boat should not be held responsible to the owners unless it be clearly shown that he has been guilty of negligence, by which the loss was occasioned—but he cannot escape responsibility when such negligence is shown, simply because other persons are also culpable. In such case, he is bound *in solido* with the other negligent parties. *Ibid.*

13. The maxim, *qui facit per alium, facit per se*, applies with equal force to owners of steamboats, who are liable to third persons in civil suits for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances or misfeasances, and omissions of duty of their agents in the course of their employment, even if they forbade the acts or disapproved of them. In all such cases the rule, *respondeat superior* applies. *Howes* v. *Steamer Red Chief*, 321.

14. The rule, that the master is not responsible to one agent, for the injury he has sustained through the negligence or omission of duty of another agent, does not apply to the case of hired slaves. And where a slave was hired, as deck-hand, to a steamboat and drowned through want of care on the part of the mate—*Held:* That the captain and owners were responsible. *Ibid.*

15. The 9th section of the Act entitled "An Act relative to steamboats," approved March 15th, 1855, embraces all cases of loss or damage arising from carelessness, neglect or want of skill in the direction or management of any steamboat and cannot be restricted to cases of collision. Nor is it under the act necessary to swear as to the names of the owners in order to proceed by provisional seizure. *Ibid.*

16. In an action for malicious prosecution the specific allegation of *want of probable cause* is not essential or sacramental. Where the allegations of the petition amply indicate a want of probable cause, they contain all the necessary elements to prosecute the action. *Burkett* v. *Lanata*, 337.

17. The question of probable cause is composed of law and fact—it being the province of the jury to determine whether the circumstances alleged are true, and of the court to determine whether they amount to probable cause. *Ibid.*

18. The allegation and proof that a party was arrested on an affidavit made by another, that he was discharged by the examining magistrate *proprio motu*, but clearly with the knowledge and silent acquiescence of the prosecutor, that the prosecution is at an end, and that the prosecutor acted without probable cause, and in legal intendment maliciously, gives the right to an action for damages. *Ibid.*

19. If no evidence is given of particular damages, the jury are not therefore bound to find nominal damages only. *Ibid.*

OFFENCES AND QUASI OFFENCES (*Continued*).

20. Exemplary damages should be commensurate to the nature of the offence, having due regard to the standing of the parties, and when extravagant damages are allowed, they will be reduced to their proper standard. *Ibid.*

21. Where a slave belonging to a party residing in Kentucky, was hired as fireman on board a steamboat running as a packet between Louisville and New Orleans, but occasionally making trips to St. Louis, and upon the boat's making one trip to Cincinnati the slave disappeared—*Held:* That althought she was advertised for Cincinnati to the knowledge of the lessor at the time he hired the fireman to the boat, yet there was a great want of prudence and care in proceeding to Cincinnati with the slave on board, and that under the common as well as civil law the lessees are responsible for the value of the slave. *Beverley* v. *Steamer Empire*, 432.

22. The fact that the boat was in the habit of landing at points in Indiana and Illinois does not change the case, so long as it is not shown that there was equal risk of losing a slave there as at Cincinnati. *Ibid.*

23. Where an action is brought to recover damages on account of injury done by the accidental falling of a structure, proof that there was no fault or negligence imputable to the defendant, and that there was no original imperfection in the structure, is sufficient to avoid liability on his part. *Burton* v. *Davis*, 448.

24. Co-trespassers are bound *in solido* for damages occasioned by trespass. *Wallace* v. *Miller*, 449.

25. Where a slave in the custody of a Sheriff, under an execution, escapes by *breaking the jail*, in consequence of its defective construction, or its want of necessary repairs, and not in consequence of the Sheriff's negligence in securing the entrances into the jail, which are under his special care and control, the Sheriff is not responsible. *Brainard* v. *Head*, 489.

26. The fact that a slave thus escaped remained in the parish and was occasionally seen by other persons for some time after his escape, are not inconsistent with a faithful discharge of the Sheriff's duty, unless it be proved that the knowledge of these facts was brought home to the Sheriff, and he neglected or refused to act upon them. *Ibid.*

27. Where a conditional order is issued by a Judge to a Sheriff, and the facts which constituted the proviso or condition are true, the order becomes in effect a peremptory mandate to the Sheriff. *Ibid.*

28. Where an order of a Judge has been granted in error of fact, although that error of fact is known to the Sheriff when he executes the order, his duty is to obey and execute the lawful mandates of the court, and in the discharge of this duty, he is justified and protected by the law, and cannot be held liable in damages. *Ibid.*

29. If a Sheriff makes a seizure of property after he has been informed that the title is not in the debtor, but in some third person, he is bound *in solido* with the seizing creditor, to indemnify such third person in damages. *Atkinson* v. *Atkinson*, 491.

30. In an action for damages arising *ex delicto*, the single fact that the defendant was acquitted in a criminal prosecution for the offence, notwithstand-

OFFENCES AND QUASI OFFENCES (*Continued*).

ing the plaintiff gave his testimony against him, unsupported by any other evidence of justification, cannot benefit the defendant where there is other evidence sufficient to support the demand for damages.

Beausoliel v. *Brown*, 543.

31. Those who commit torts, or assist or encourage others in so doing, are bound *in solido* for the damages occasioned by the trespass.

Irwin v. *Scribner*, 583.

32. The release of one of several debtors, *in solido* in an obligation arising from a trespass, operates the extinguishment of the debt as to the remaining co-debtors, unless the creditor has expressly reserved his right against the other debtors *in solido*. *Ibid.*

See PRINCIPAL AND AGENT—*Imboden* v. *Richardson*, 534.

OFFICE AND OFFICER.

See ELECTION—*Petit* v. *Rousseau*, 239.

OPPOSITION.

See PLEADING—*Converse* v. *Steamer Lucy Robinson*, 433.

PARENT AND CHILD.

1. The father and mother, as administrators of the property of their minor children, cannot borrow money in the name of their children, nor can they bind them by confessing judgment in a court that has no jurisdiction over their domicil. *Michie* v. *Armat*, 225.

See SUCCESSIONS—*Wood* v. *January*, 516.

PARTITION.

1. In an action for the partition of the effects of an ordinary partnership, brought by the surviving partner as administrator, where the deceased has left minor heirs, they cannot properly be represented by an attorney for absent heirs, and it is not competent for such administrator and attorney, without other parties, to obtain a valid decree for a partition, and they are not proper parties to represent the succession in a sale to effect such partition. *Savage* v. *Williams*, 250.

2. Where the representative of a succession claims a partition of property in which minors are interested as beneficiary heirs, whether residents or non-residents, they should be made parties or represented according to the rules prescribed for partitions. *Ibid.*

3. Necessary expenses paid by the parent for one of the children, or by the administrator after the parent's death, should be deducted from the share of that child, upon the partition of the succession.

Succession of Montamat, 332.

4. In the partition of a succession, where there are minor heirs, if they have opposite interests to each other, although represented by the same tutor, there should be appointed to each of them a special tutor, or tutor *ad hoc*. But in a partition by roots, where the minors form but one root, their in-

PARTITION (*Continued*).

terests *inter se* do not clash, but on the contrary, are alike, and the necessity for the appointment of special tutors does not then arise.
Hagan v. *Grimshaw*, 394.

5. A party may legally make a partition, either of the whole or of a portion of his estate, among his descendants, during his lifetime, by a notarial act; such a partition is, however, subject to all the formalities and conditions of *donations inter vivos*. *Martin* v. *Martin*, 585.

6. A partition must be considered as one act, although it contain many dispositions, and it cannot subsist for one while it is annulled for another.
Ibid.

7. An heir who has alienated his share in a partition, or a part of it, is not permitted to bring the action of rescission against such partition, where there has been no fraud, violence, error or lesion. *Ibid.*

8. Where a minor is interested, the Judge, if satisfied that the property cannot be divided in kind, should not only decree the sale of such property, but should likewise order the convocation of a family meeting to fix the terms of the sale as to the share of the minor. *Gernon* v. *Bestick*, 697.

9. The Judge should require proof, that property cannot be divided in parts of equal value, without the cantling of tenements to an injurious extent, before ordering a partition by licitation. *Ibid.*

PARTNERSHIP.

1. In the absence of an express stipulation to the contrary, the owners of a steamboat employed in carrying persons and merchandize for hire, bring the *use* only, and not the *property* of the boat, into the partnership—they hold as tenants in common. *Owens* v. *Davis*, 22.

2. Where an agreement was made in writing by one partner, signing the name of the firm, in which it was agreed that the firm should pay to the brother of the partner making the agreement, a salary for services to be rendered by him, and the evidence showed that the party thus employed was unfit to discharge the duties imposed upon him by the agreement, and the agreement was kept from the knowledge of the other partner—*Held:* That under such circumstances, no effect should be given to the agreement, as an evidence of indebtedness, against the creditors of the partnership.
Beste v. *His Creditors*, 55.

3. In an action for the settlement of partnership accounts, where it appears that the parties have kept books of their daily affairs, they should be shown to be clearly erroneous, before a party should be permitted to recover beyond the same, for a matter which ought to have been entered regularly every day. *Parker* v. *Jonté*, 290.

4. Where a suit is brought against a firm, the name of one of the partners composing which is alleged to be unknown, a judgment cannot be rendered against the firm so far as concerns the unknown partner; but where the other partner, not having been personally cited, appeared and filed a general denial, and upon judgment being rendered against the firm, appealed as a partner—*Held:* That he was bound by the decree.
Grieff v. *Kirk*, 320.

PARTNERSHIP (*Continued*).

5. Where parties purchase on joint account, and for speculation, a lot of goods, with the understanding that they shall share equally the profits and losses which may result from the sale thereof, the advances and expenses are to be first paid, before there can be any division of the profits. It partakes of the nature of a partnership. *Doane* v. *Adams*, 350.

6. A law partnership is an ordinary one, and the partners are bound jointly, but not *in solido*. *Jones* v. *Caperton*, 475.

7. A partner who complains of error in the settlement of a partnership account, approved by the signature of the partners, should make it appear by proof. *Bry* v. *Cook*, 493.

8. The right of a surviving partner under Arts. 1131, 1152, and 1136, to administer the partnership effects, and to dispose of the same in the ordinary course of trade, is not an absolute right, but depends on the consent of the heir present or represented in the State, capable of accepting the succession purely and simply. *McKowen* v. *McGuire*, 637.

See PLEADING—*Dyas* v. *Dinkgrave*, 502.
See WITNESS—*James* v. *Brooke*, 541.
See HUSBAND AND WIFE—*Rolling* v. *Bordenave*, 647.
See PRESCRIPTION—*Carroll* v. *Gayarré*, 671.

PAYMENT.

1. The holder of several notes of the same maker has a right to impute a partial payment made on them to part of the notes, and is not bound to make the imputation to all *pro rata*. *Blackman* v. *Leonard*, 59.

2. Where there is a question of imputation of payment, the payment will be imputed to the debt bearing a mortgage, rather than to those which do not bear a mortgage. *New Orleans Ins. Co.* v. *Tio*, 174.

3. Where property upon which a privilege exists, has been purchased at Sheriff's sale, and after the privileged creditor has obtained judgment against the former owner of the property, and a recognition of his privilege, the purchaser pays the amount of the judgment—*Held:* That by Art. 679 of the Code of Practice, he was bound to extinguish the judgment, and the fact that he was the vendor of the property, and that it was sold at his suit to pay the purchase price, would not release him from the obligation, and that his payment does not give rise to any subrogation, by operation of law, to the rights of the judgment creditor against the former owner of the property. *Sturges* v. *Taylor*, 285.

4. Where a planter was indebted to his merchants for acceptances which had fallen due and been paid, and also on a promissory note—*Held:* That before the maturity of the note, credits of the planter, where no imputation has been made, should be imputed to the payment of the acceptances, because they were first due, though less burdensome, and the credits *after the maturity of the note* must be imputed to its payment, because the debtor *had at the time most interest in discharging it.*
Byrne v. *Grayson*, 457.

5. The debtor has the right to declare, when he makes a payment, what debt he intends to discharge; and if he does not make the imputation of payment, the law makes it for him, and declares that the payment must be

PAYMENT (*Continued*).

imputed to the debt which it was most to the interest of the debtor to discharge, of those debts equally due, otherwise to the debt which has fallen due, though less burdensome than those which have not yet fallen due. *Slaughter* v. *Milling*, 526.

6. The imputation, when made by the creditor, must be accepted by the debtor, to be binding on him. *Ibid.*

See MORTGAGES—*Cummings* v. *Ervin*, 289.

PLEADING.

1. Where the defendant in a suit sets up a reconventional demand, the plaintiff is not permitted to discontinue his suit when defendant opposes it. And if the plaintiff has discontinued the suit, without opposition on the part of defendant, the latter has the right to prosecute against him his claim in reconvention, notwithstanding the discontinuance. *Barrow* v. *Robichaux*, 70.

2. In an action brought by a child to recover property which has been sold by his father, before he can be allowed to prove that his father has defrauded him of his *légitime* by simulated sales of his property, simulation must be alleged in the petition, and the simple allegation that defendant knowingly and tortiously detains from plaintiff, without any legal right, lands which plaintiff has inherited from his father, will not be sufficient. *McQueen* v. *Sandel*, 140.

3. A child and heir of a party to a simulated sale is, only exceptionally and in a limited sense, entitled to assume the position of a third person in relation to it. His action, to be relieved from it, must be declaratory of the simulation. *Ibid.*

4. It is not necessary that the description of property demanded in a petitory or rescissory action should be described with such certainty, that the Sheriff, or any other person, could find the same without aid. *Lea* v. *Terry*, 159.

5. A final judgment cannot be rendered on an appeal taken from a judgment rendered on a peremptory exception filed after issue has been joined by default, where the plaintiff did not treat such exception as an answer in the lower court. Such a case will be remanded, to be proceeded with according to law, and the exception permitted to stand as an answer. *Ibid.*

6. Where a suit has been brought by a bank to recover the price of property sold, and during the pendency of the action a third party is subrogated to the rights of the bank, such third party will be competent to stand in judgment as intervenor, although the deed of sale under which he claims was not accepted by him until after the expiration of the bank's charter—provided the legality and sincerity of the transaction is not otherwise questioned. *Union Bank* v. *Bowman*, 271.

7. It is not a cumulation of inconsistent demands for a party seeking to recover his slave, to ask his value in the event of not being able to recover the slave himself. *Nouvet* v. *Bollinger*, 293.

PLEADING (*Continued*).

8. The admissibility of evidence given of facts not alleged in the petition, should be objected to when offered, and the point reserved; otherwise it will be considered as if it had been responsive to an allegation in an amended petition, filed with consent of the opposite party.
England v. *Gripon*, 304.

9. In actions upon contracts and deeds, if any part of the contract proved, or deed described, should materially vary from the contract or deed as stated in the pleadings, it will be fatal. *Shaw* v. *Noble*, 305.

10. A demand for a certain sum of money, as commission on an amount collected by plaintiff for defendant, gives the latter the right to reconvene for the sum of money in plaintiff's hands, on which he charges his commission. *Hynson* v. *Wheeler*, 409.

11. A mistake in the special prayer ought not to prejudice a party's right to recover on the averments of his petition, when they are sufficient to sustain the proper action, and are followed by a prayer for general relief.
Espinola v. *Blasco*, 426.

12. A judgment awarding a privilege on a steamboat, by virtue of an attachment, although entirely binding between the parties to it, may nevertheless be questioned by another creditor who was not a party to the judgment, by way of third opposition.
Converse v. *Steamer Lucy Robinson*, 433.

13. In an action to recover damages against a Sheriff, for trespass in the execution of a writ of sequestration, where the defendant excepts to plaintiff's demand, upon the ground that the latter has no cause of action against him, since he acted in his capacity of Sheriff, and in a legal manner, the exception should aver that the acts complained of in plaintiff's petition are the same and none other than those mentioned in the exception; yet, if this averment is not made on the trial, and testimony to show that the acts were the same, is admitted without objection, effect must be given to this testimony. *Flournoy* v. *Milling*, 473.

14. The exception of *lis pendens* must be pleaded *in limine litis*.
White v. *Gleason*, 479.

15. There is no objection to the cumulation of a demand in separation of property by the wife, with an action to enjoin the seizure of certain property claimed by her as her separate property, and seized under execution by the creditors of her husband. *Atkinson* v. *Atkinson*, 491.

16. Where a title is claimed to be valid under the laws of another State, where it was acquired, those laws must be produced in evidence or proved, otherwise the validity of the title will be made to depend upon our own laws.
Ibid.

17. A commercial firm cannot demand in the same suit the payment of two promissory notes, although they are dated at the same place, and on the same day, and both payable to the firm under its firm name, where it is shown that such firm was composed of different persons, when the indebtedness was created which formed the consideration of one note, from

PLEADING (*Continued*).

those persons who composed the firm when the indebtedness was incurred which formed the consideration of the other note. It would be a case of distinct creditors joining in the same action their separate and distinct demands against the debtor. *Dyas* v. *Dinkgrave*, 502.

18. Under such circumstances, the old firm and the new firm would be considered in law as separate and distinct persons, with separate and distinct rights and obligations, and could not, as creditors, join in the same action their separate and distinct demands against their debtor. The law does not permit *separate creditors* to join in an action against their debtor, unless there be a joint interest between them in the thing demanded, or a privity of contract, which authorizes the joinder. *Ibid.*

19. Whenever the plaintiff in an action dies, after an answer has been filed, the suit must be revived by the appearance of the legal representatives; but this is not a new suit, and when the executor files an amended petition merely for the purpose of making himself a party to the proceedings, the defendant, although entitled to notice, cannot claim the legal delays allowed for answering the original petition. He has the right to file an answer to the amendment; but it must be done immediately, unless the amendment be of such a nature as to induce the court, upon his motion, to grant further time for answering the same.

Woodman v. *Richardson*, 508.

20. Where a suit was brought in the name of certain persons, as composing a commercial firm, and the defendant excepted to the petition, upon the ground that all the members of the firm, had not been joined in the action—*Held:* That where it was shown that the name of one of the persons used in the style of the firm was omitted, the burden of proof was on the plaintiffs to show that they alone composed the firm.

Rugely v. *Gill*, 509.

21. The burden of proof is on the party who has to support his case, by proof of a fact of which he is most cognizant. *Ibid.*

22. In case of the omission of one of the names appearing in the style of the firm, the defendant is not bound to state in his exception the name of the partner not joined in the action. *Ibid.*

23. Where a defendant desires to avail himself of admissions contained in the original petition, he should except to the amended petition filed for the purpose of explaining the admissions made in the original, instead of answering the same. When an answer is made to the amendment, and the case tried, both petitions are to be taken as a whole and construed together. *Turner* v. *Madden*, 510.

24. In a petitory action, it is incumbent on the defendant to exhibit the title under which he claims ownership; and an allegation made by the plaintiff, in a previous suit for the same cause of action, that the defendant claimed the ownership under a tax sale which the plaintiff charged to be an absolute nullity, will not be construed into an admission by the plaintiff, that he had been divested of his title.

Reynolds v. *Stille*, 543.

PLEADING (*Continued*).

25. The presumption *omnia rite acta* cannot be applied to a title not introduced in evidence; and, under such circumstances, the prescription of five years cannot be invoked to cure irregularities in the title. *Ibid.*

26. A plaintiff cannot be permitted to establish by proof a cause of action not alleged in the petition, without the consent, express or implied, of the defendant. *Broxton* v. *Bloom*, 618.

27. A party may cumulate separate actions in the same demand, when the one is not contrary to the other, nor precludes it, even though they arise from different contracts. *Médart* v. *Fasnatch*, 621.

28. A party's appearance by attorney to move for the dismissal of an attachment and to except to the jurisdiction of the court over him, cannot be construed into a submission to the jurisdiction which would authorize a judgment *in personam*. *Billiu* v. *White*, 624.

29. The right to intervene by way of third opposition is a privilege granted by law which the court cannot refuse when the right is legally exercised. *Bowman* v. *McElroy*, 663.

30. Where a supplemental and amended answer has been filed by order of court, the Judge who permitted its filing cannot, *proprio motu*, rule it out, as not filed in time. *Heiss* v. *Corcoran*, 694.

See PARTNERSHIP—*Grieff* v. *Kirk*, 320.
See ACTION—*Young* v. *Chamberlin*, 454.
See EVIDENCE—*Holmes* v. *Dabbs*, 501.
Ruhlman v. *Smith*, 670.
Hereford v. *Lake*, 693.
See PRACTICE—*Elkridge* v. *Milling*, 513.
See MARRIAGE—*Summerlin* v. *Livingston*, 519.
See INJUNCTION—*Chambliss* v. *Miller*, 713.

PLEDGE.

1. In order to create a pledge, it is necessary, not only that delivery should accompany the private deed, but also that the instrument should exhibit the nature and extent of the reciprocal rights and obligations of the contracting parties. *Martin* v. *His Creditors*, 165.

POLICE JURY.

1. In an action to recover the amount for which work has been adjudicated on a road, to be made as required by the regulations of the Police Jury, to render the owner of the land liable, it must be shown that the forms of the law were complied with when the adjudication was made, and that the work has been done in conformity to law and to the terms of adjudication. *Grass* v. *Haynes*, 181.

2. Although the certificate of the Inspector is made by the ordinances of the Police Jury evidence of the debt, their acceptance of the work is not conclusive evidence that it was done in conformity to law and to the terms of adjudication. *Ibid.*

3. A police juryman is not an officer, in the intendment of Article 122 of the State Constitution; there is no reason, therefore, why a party who holds a civil office of emolument should not be at the same time a police juryman. *Voorhies* v. *Fournet*, 597.

POSSESSION.

1. The possessor in good faith is entitled, in case of eviction, to be reimbursed the amount expended by him for improvements.

Roberts v. *Brown*, 698.

PRACTICE.

1. A supplemental petition in an injunction suit, should only be allowed for the promotion of justice, and when allowed, an affidavit of the truth of the allegations of the petition, and of the causes that make the amendment necessary, should always be required. *Maillot* v. *Martin*, 40.

2. An alien who is sued in a State Court by a citizen of the State, may, by complying with the requirements of the Act of Congress of 1789, remove the case to the Circuit Court of the United States; but he cannot claim a dismissal of such suit. *Webre* v. *Duroc*, 65.

3. An intervenor must always be ready to exhibit his evidence; he cannot be permitted to retard the principal suit. *Gaines* v. *Page*, 108.

4. Where an action has been brought to recover property, and at the time of the commencement of the suit one of the plaintiffs had no interest in the title, having previously transferred his rights, but subsequently acquires interest by an act of retrocession—*Held:* That the want of interest at the time of the institution of the action is a good ground for a judgment of nonsuit, and that the act of retrocession thus passed after the commencement of the suit is not admissible in evidence.

Dugas v. *Truxillo*, 116.

5. In a third opposition to a seizure of property, based upon the alleged ownership of such property, the issue to be tried between the third opponent, and the party provoking the seizure, is the fact of ownership.

Harper v. *Commercial & Railroad Bank of Vicksburg*, 136.

6. The third opponent stands in the attitude of plaintiff, and is bound to administer proof of his pretensions, in order to sustain his opposition. But he cannot inquire into the validity of the proceeding between the plaintiff and defendant in the original suit. *Ibid.*

7. It is too late, after a judgment by default, to except to the jurisdiction of the court, on the ground of commorancy. *Tegarden* v. *Powell*, 184.

8. Where a party consents to go to trial on the merits, without insisting on the previous action of the court on his exceptions he is presumed to have waived the same. *Powell* v. *Graves*, 188.

9. A judgment cannot be rendered on a petition of intervention which has been filed without leave of the court, and has not been served or put at issue.

Bradley v. *Trousdale*, 206.

10. Where a party, on the trial of a cause before a jury, is taken by surprise by the loss of evidence, his remedy is either a continuance or postponement of the trial on a proper showing, and he should not be permitted to take the chances of a verdict in his favor, and afterwards claim the benefit of a new trial. *McClure* v. *King*, 220.

PRACTICE (*Continued*).

11. Where the tutor of a minor dies out of the State in hopeless insolvency, leaving no property whatever upon which to administer, the minor cannot be required, under the circumstances, to sue for a rendition of accounts, as a condition precedent to the institution of the hypothecary action.
Cummings v. *Erwin*, 289.

12. Where the ancestor of a party has parted with a slave, for the express purpose of defeating the rights of creditors, an action will lie to recover the value of the slave thus sold or removed. *Nouvet* v. *Bollinger*, 293.

13. As a general rule, the powers of the syndics of creditors are only those of administration; but under the authorization of the courts, he may make sales of property, and by their aid may recover damages for property destroyed or abstracted from the mass, when otherwise there would be a failure of justice. *Ibid.*

14. Where a plaintiff offered to discontinue a suit, having given the Clerk of the court instructions to that effect, prior to the filing of a reconventional demand, but the defendant resisted the discontinuance and was sustained by the court—*Held:* That whether the plaintiff's original demands were urged to the jury or not, it was an error to disregard them on the final judgment. If no evidence was offered to sustain them, a judgment of nonsuit should have been rendered; if they were proved to have been novated, judgment should have been rendered against the plaintiff; if they were established, plaintiff should have had judgment.
Smith v. *Amacker*, 299.

15. Evidence called for *ex officio*, by the Judge, after the case is submitted and under advisement, is unauthorized and will be disregarded on appeal.
Sowers v. *Shiff*, 300.

16. The offering a note in evidence upon trial, without objection, dispenses with the necessity of proving the signatures upon the note necessary to charge the party against whom the note is offered.
Robertson v. *Fullerton*, 318.

17. Where a suit was brought upon a note given in part payment of the price of a plantation, and the defence set up was that the defendant had been disquieted in his possession of the plantation by a petitory action instituted against him,—*Held* (under Article 2536 C. C.): That the District Court had the power to render an interlocutory judgment ordering the defendant to deposit in court the amount of the note sued upon, to await the decision of the petitory action. *Jacobs* v. *Sauvé*, 424.

18. Although the value of the portion claimed in the petitory action does not equal the amount of the note, yet the whole sum must be deposited to await the termination of the action, which may result in the cancellation of the sale. *Ibid.*

19. An order of the court, entered upon the minutes, is a part of the record of the case, and it is not, therefore, necessary to offer it in evidence in order to bring it to the notice of the court or jury.
Pagett v. *Curtis*, 451.

PRACTICE (*Continued*).

20. An injunction bond improperly made payable to the Sheriff, his heirs and assigns, instead of to the defendants in the suit, is nevertheless sufficient to sustain an action in behalf of the real parties in interest. *Vicksburg R. R.* v. *Barksdale*, 465.

21. The bond in such a case is only the evidence of a contract, which would exist were the bond lost, and the court will look at the petition for injunction and the order granting it, to find out what obligation the plaintiff in injunction and his surety assumed. *Ibid.*

22. Injunctions, attachments, etc., are matters of strict law, and it does not follow that because a party has given an informal bond, that the same by proper averments and proof may not still be enforced by an action. *Ibid.*

23. An action on an injunction bond is a sufficient putting "*in mora.*" *Ibid.*

24. The Sheriff cannot be held to show the validity of a judgment which he has been commanded to execute, and to satisfy with moneys that may come into his hands. It is his duty to pay the proceeds of his sales over to the seizing creditors, shown to be entitled to them by *the certificate of mortgages* and *by the writs of fieri facias in his hands.* And if concurrent seizing creditors intend to contest each other's right, or mortgage, or privilege, they must do so contradictorily with each other, whilst the proceeds remain with the Sheriff, and cannot afterwards hold him responsible for the payment of such proceeds to the parties shown by the writs and certificate of mortgages to have been entitled to the same. The creditor's remedy is by third opposition, or action of nullity, to avoid the judgment recognizing the mortgage or privilege, and ordering it to be enforced against the debtor's property. *Ethridge* v. *Milling*, 513.

25. Where a Sheriff, after having satisfied all the prior mortgages, pays over the entire balance of the proceeds of the sale, to one of several seizing creditors whose mortgages are concurrent, he is responsible to the others, for the amount, or *pro rata* of the proceeds, to which they were entitled at the time of the sale and distribution. *Ibid.*

26. The effect as regards creditors, of a judgment annulling a sale made by their debtor as fraudulant is the same, whether pronounced in a direct revocatory action, or in an injunction suit arising out of the seizure of the property by one of the creditors. *Ross* v. *Pritchard*, 531.

27. If no objection is made to the form of proceeding, the sale may be declared fraudulent in one form as well as the other. *Ibid.*

28. Where the seizure of land was enjoined, upon the ground that the plaintiffs in injunction had acquired such land at the Sheriff's sale and the defendant raised the objection of want of registry of such sale in the Recorder's Office—*Held:* That where the evidence discloses no title in the seized debtor, the defendants having no interest in the matter, this objection cannot be urged by them. *Maillon* v. *Lynch*, 547.

29. The validity of a title claimed adversely to a succession administered by a curator cannot be inquired into in the form of a rule taken by the cura-

PRACTICE (*Continued*).

tor against such adverse claimant, to show cause why a sale of the property provoked by the curator should not be confirmed; a direct action is necessary. *Succession of Renneburg*, 661.

30. Where suit was instituted for damages alleged to have been sustained by the plaintiff in consequence of the closing of the ditches on his plantation by the building of a railroad, and no evidence was given on the trial from which an estimation of the damages could be formed, and the jury found a verdict for the plaintiff, the court remanded the case for a new trial. *Trudeau* v. *Jackson R. R.* 717.

See JUDGMENT—*Morris* v. *Bailey*, 2.
Succession of Gorrison, 27.
See TUTORS AND TUTORSHIP—*Interdiction of Rochon*, 6.
Martel v. *Richard*, 598.
See HUSBAND AND WIFE—*Phelps* v. *Rightor*, 33.
Schewer v. *Klein*, 303.
See SIMULATION—*Collins* v. *Pratt*, 42.
Van Ostern v. *Simmons*, 302.
Nouret v. *Vitry*, 653.
See EVIDENCE—*Lacroix* v. *Tournillion*, 69.
Forbes v. *Fahrmer*, 319.
Hughes v. *Carey*, 348.
See MANDAMUS—*State* v. *Lusitanian Society*, 73.
See SHERIFF—*Shannon* v. *Goffe*, 86.
See ACTION—*Gentis* v. *Blasco*, 104.
Young v. *Chamberlin*, 454.
See CONTRACTS—*Rizan* v. *Prescott*, 112.
Millard v. *Farley*, 518.
See NULLITY—*Clark* v. *Hebert* 279.
See LIBEL AND SLANDER—*Schewer* v. *Klein*, 303.
See APPEAL—*State* v. *Judge Fifth District Court*, 336.
See ABSENTEE—*Pagett* v. *Curtis*, 451.
See PLEADING—*Dyas* v. *Dinkgrave*, 502.
Woodman v. *Richardson*, 508.
Rugely v. *Gill*, 509.
Turner v. *Madden*, 510.
See DONATIONS—*Johnson* v. *Alden*, 505.
See JURIES AND JURORS—*Frellsen* v. *McDonald*, 536.
See INTERROGATORIES—*Woodruff* v. *Dodd*, 644.

PRESCRIPTION.

1. An account which is *signed and rendered by the debtor* is not an open account, and as such prescribed by three years. *Graham* v. *Sykes*, 49.

2. A note addressed to a physician, stating that his account had been examined, and the charges found to be exorbitant, coupled with a refusal to pay, is not a sufficient acknowledgment to interrupt the prescription of such account. *Stewart* v. *Watts*, 135.

3. Statutes of prescription and limitation cannot be extended from one action to another, nor to analogous cases beyond the strict letter of the law. *Garland* v. *Scott*, 143.

4. In order to plead a foreign statute of limitation, under the Act of 15th of March, 1855, in bar of a judgment rendered in another State, it must be shown that the prescription was complete, and that there were no adequate means of enforcing the judgment in the State where it was rendered. *Morton* v. *Valentine*, 150.

PRESCRIPTION (*Continued*).

5. Where a judgment is rendered in the State of Mississippi, and barred by the statute of limitation, but is subsequently revived by a judgment on a writ of *scire facias*, the prescription of ten years in this State is interrupted by such judgment. *Ibid.*

6. Statutes pertaining to the remedy are merely such as relate to the course and form of proceeding, but do not affect the substance of a judgment when pronounced. *Ibid.*

7. A suit brought against the acceptors of a bill of exchange does not interrupt prescription as to the drawer and endorser.
Corning v. *Wood*, 168.

8. The action of supplement of the price on the part of the seller, where the overplus exceeds a twentieth part of the extent of the premises sold, is subject to the prescription of one year. *Stewart* v. *Boyd*, 171.

9. The principles as to prescription, governing ordinary contracts of sale, are applicable to public sales in general. *Ibid.*

10. In a suit brought by the trustees of a Mississippi bank to recover money due on a judgment obtained by them in the State of Mississippi, which judgment was barred by the statute of limitations there—*Held:* That the Act of the Legislature of the 27th of May, 1846, was intended to prohibit the exercise of any right which the laws at home did not permit to be exercised there; and that, where a bank could not exercise a right growing out of a judgment in Mississippi, on account of the statute of limitations, the Act of 1846 would prevent its exercise here.
Mandeville v. *Huston*, 281.

11. The doctrine of the interruption of prescription is not admitted at common law to the extent allowed by the civil law; the maxim there is, that when the statute of limitations has once commenced to run, it never stops on account of any subsequent disability. But by the law of Mississippi, an exception is made to this general rule in favor of the *first* absence of the debtor from the State at the time of the accruing, or after the accruing of the action, which is alone to be deducted. *Ibid.*

12. The party who pleads prescription is bound to prove the facts necessary to sustain the plea. *Succession of Montamat*, 332.

13. By the Act of 1855, p. 352, the right to the repetition of usurious interest paid is limited to one year. *Weaver* v. *Maillot*, 395.

14. The foreign debtor is entitled to avail himself of our laws of prescription, just as though he had always been subject to the jurisdiction of our courts.
Norton v. *Sterling*, 399.

15. Where there is no allegation or proof that the foreign debtor had changed his domicil, and that the same was unknown to the creditor, or that the creditor could not, on account of some other obstacle, have instituted an action at the domicil of the debtor, the maxim, *contra non valentem agere non currit prescriptio*, will not apply. *Ibid.*

16. Whatever may be thought of the policy of the law, the courts have no power except to enforce it. *Ibid.*

PRESCRIPTION (*Continued*).

17. An action against a Notary, to render him responsible for negligence, in omitting to give notice to a drawer or endorser of a draft protested by him for non-payment, is based on the Article 2295 of the Civil Code, and falls under the prescription of one year established by Article 3501.
Taylor v. *Graham*, 418.

18. By the Act of the 18th of March, 1858, which was in force from its date, the prescription for privileges on vessels was extended to six months.
Converse v. *Steamer Lucy Robinson*, 433.

19. Where the property of a succession has, by order of court, been sold, and the money paid into the hands of the administrator, although such administrator, on account of the fiduciary and quasi official relation which exists on his part towards the court and succession, cannot prescribe against the demands of the heirs, yet the heirs of such administrator, after his death, are entitled to the plea of prescription. Prescription, therefore, commences to run in favor of the heirs of the administrator, from the death of the latter. *Bennett* v. *Alexander*, 469.

20. Claims for services as an overseer are governed by the prescription of three years. *Copse* v. *Eddins*, 528.

21. The prescription in this case runs against minors, reserving however to them their recourse against their tutors or curators. *Ibid.*

22. Where a party's services were employed, on the express promise that he was to inherit a portion of the estate of his employer—*Held:* That prescription was suspended in favor of the employee, until the death of his employer. *Ibid.*

23. The action of mandate arises *ex contractu*, and is only prescribed by ten years. *Imboden* v. *Richardson*, 534.

24. The prescription of three years applicable to a loan of money does not apply to a due bill given at the time for such loan.
Collins v. *McElroy*, 639.

25. Before the passage of the Act of the Legislature approved April 30th, 1853, there was no term of prescription in the law applicable to domestic judgments. *Succession of Rice*, 649.

26. Domestic judgments rendered anterior to the passage of the Act of the Legislature of 1853, cannot be barred, under that statute, before the lapse of ten years from its promulgation. *Ibid.*

27. One partner can interrupt prescription as to all the other partners who are bound *in solido*, even after the dissolution of the partnership.
Carroll v. *Gayarré*, 671.

28. In order to prescribe for a slave in five years, by adding the possession of the vendor to that of the vendee, it is necessary that the vendor as well as vendee should have held under a just title as owner.
Girault v. *Zuntz*, 684.

See TAXES, TAX SALES, &c.—*Woolfolk* v. *Fonbene*, 15.
See BILLS OF EXCHANGE, &c.—*Garland* v. *Scott*, 143.
PLEADING—*Reynolds* v. *Stille*, 543.

PRINCIPAL AND AGENT.

1. The power to endorse bills of exchange and promissory notes must be express and special. *Ducongé* v. *Forgay*, 37.

2. An authorization to endorse other promissory notes cannot be inferred from the fact that the party whose name was forged on them did not publicly denounce the forgery which first came to his knowledge; this neglect on his part to denounce the crime to the public authorities, does not make him responsible for other forgeries of his name which were then unknown to him, or give rise to an action for damages under Articles 2294 and 2295 of the Civil Code. *Ibid.*

3. The decision in the case of *Parlange* v. *Faurès*, 14 An. 444, affirmed, to the effect, that when a broker or agent sells a note with forged endorsements on it, without disclosing the fact of his agency or the name of his principal, he is responsible for the amount, with legal interest, which was paid for the note. *Séré* v. *Faurès*, 189.

4. An authority given to an agent to collect a debt carries with it the authority to sue for it, and issue execution upon the judgment obtained. *Joyce* v. *Duplessis*, 242.

5. In an action brought against a party for damages for an illegal seizure of property pointed out by a person acting as his agent, judgment will be rendered against him if in his answer he denies only the authority of the agent to issue execution; he must deny the whole agency to relieve himself from responsibility. *Ibid.*

6. The acts of a principal will not amount to a ratification of a contract, when they are entirely based upon the representations of the agent, who was himself deceived as to the real existence of the thing which was the object of the contract. *Mummy* v. *Haggerty*, 268.

7. There can be no valid ratification when the contract is without an object. *Ibid.*

8. Where a United States Marshall offers a reward for the arrest of a fugitive from his custody, he acts as a principal; and although he may have signed with the addition of the words U. S. Marshall, he cannot avoid liability. *Murray* v. *Kennedy*, 385.

9. Where an agent authorized to sell a thing for a particular price, sells it at a higher price, the surplus will belong to the principal, and the agent is entitled only to his stipulated commission. *Denson* v. *Stewart*, 456.

10. A party plaintiff is entitled to an injunction to restrain a third person who is in possession of a sum of money in controversy, from paying it over to the defendant, where the plaintiff is in danger of losing it, owing to the claim of defendant and his insolvency. *Ibid.*

11. Where a commercial firm, being the holder of certain promissory notes, remitted them before maturity to another firm, to be collected and applied to the extinguishment of a debt existing in favor of the latter firm from the former, and endorsed them in order to render their collection more easy, it being understood that the balance remaining after the payment of the debt was to be paid over to the firm which had remitted the notes—*Held*: That the firm to whom the notes were remitted must be viewed as the agent of the other for the collection of the notes, and that if the notes

PRINCIPAL AND AGENT (*Continued*).

were protested and suit brought upon them by this firm, the other, which was the original holder of the notes, never having ceased to be owner, cannot be held liable as endorser. *Miltenberger* v. *McGuire*, 486.

12. An attorney in fact is bound to discharge the functions of his procuration so long as he continues to hold it, and is responsible to his principal for the damages that may result from the non-performance of his duty. He is responsible, not only for his unfaithfulness, but also for his fault or neglect. *Imboden* v. *Richardson*, 534.

13. Where a power of attorney authorizes an agent to sell, but is silent as to the right of acquiring property, a purchase by the agent exceeds his delegated powers, and may be repudiated by the principal.
Hyman v. *Bailey*, 560.

See INTEREST—*Gordon* v. *Zacharie*, 17.
See REDHIBITION—*Bloom* v. *Bebe*, 65.
See WITNESS—*Garland* v. *Scott*, 143.
See MORTGAGES—*Watson* v. *James*, 386.
See ATTORNEYS-AT-LAW—*Beau* v. *Drew*, 461.
See ATTACHMENT—*Hill* v. *Hanney*, 654.

PRINCIPAL AND SURETY.

1. The rule, that the surety cannot plead matters personal to the principal obligor, cannot be applied to a case where the principal is alleged to be a slave, and consequently incapacitated from contracting, from motives of public policy. *Levy* v. *Wise*, 38.

2. Where in a contract of lease, it was acknowledged that the lessee was a free woman of color, by the parties to the contract—*Held:* That the sureties are not estopped, by such acknowledgment, from alleging and proving the fact that the lessee and principal obligor was a slave. *Ibid.*

3. Where the heirs, by an act under private signature, regulate between themselves the mode of partition of the estate, and authorize the curator to pay certain claims, and further verbally authorize him, in order to save expense, to settle the affairs of the estate out of court—*Held:* That the surety of the curator is not discharged from liability by such acts of the heirs, but will be held responsible on the failure of the curator to account or pay over money which he may have received. *Perkins* v. *Cenas*, 60.

4. A surety on a tutor's bond has a right to demand the cancellation of the bond, when, without his consent, any of his co-sureties are released by a judgment homologating the proceedings of a family meeting which consented to the erasure of the name of the co-surety from the bond.
Bradley v. *Trousdale*, 206.

5. In an action brought by the surety for the cancellation of the bond under such circumstances, both the tutor and under-tutor should be made parties to the suit. *Ibid.*

6. The form of the contract or instrument by which a surety binds himself for the payment of the debt, in case the debtor should not himself satisfy it, does not affect the surety's right to plead, in bar of the action against him, his discharge in consequence of a prolongation of the term of payment, without his consent. *Jones* v. *Fleming*, 522.

PRINCIPAL AND SURETY (*Continued*).

7. There is no distinction between the surety who has bound himself *in solido* with the debtor, and the surety who has not so expressly bound himself. *Ibid.*

8. The release of one of the principal debtors, by the surety, from all liability to himself as surety, renders such debtor a competent witness for the surety. *Ibid.*

9. One witness is sufficient to prove the *payment* or *extinguishment* of an obligation exceeding in amount or value five hundred dollars, without the aid of corroborating circumstances, although his testimony *per se* would not be sufficient to prove a contract not reduced to writing, for the payment of money not exceeding that amount. *Ibid.*

10. A fund deposited by the principal debtor with one of two co-sureties, as collateral security, should enure to the benefit, proportionally, of the other co-surety. *Smith* v. *Conrad*, 579.

11. Where two parties purchased together certain landed property, each one undivided half, and furnished, for the price, their joint and several promissory notes secured by mortgage on the land purchased—*Held:* That these parties must be considered as purchasers and principal obligors each for one-half only of the property purchased, and as sureties for each other mutually as to the other half; and that, consequently, the re-purchase of one-half by the original vendor, from one of these purchasers, releases the remaining purchaser from his obligation as surety, as it renders impossible that subrogation to which he would be entitled under Articles 2157 and 3030 of the Civil Code. *Succession of Daigle*, 594.

See MARRIED WOMEN—*Adams* v. *Cuny*, 485.
See MORTGAGES—*Bowman* v. *McElroy*, 646.

PRIVILEGE.

1. Where judgment has been rendered in favor of partnership creditors against all the part-owners of a steamer, whether they were creditors by privilege, or not, for their respective claims against the boat, they become privilege creditors of each of the part-owners for the amount of costs recovered, and these costs form a privilege debt upon the proceeds of the steamer superior to that of the individual attaching creditors. *Owens* v. *Davis*, 22.

2. Our law grants no privilege for money advanced to the master of a steamboat. *Ibid.*

3. The Articles of the Civil Code which give a privilege for expenses incurred for the preservation of the thing, apply only to movables. *Tom* v. *Ernest*, 44.

4. Privileges on immovables and slaves are treated of under a distinct head, and there is no privilege given as such, for expenses incurred for the preservation of a slave or immovable. *Ibid.*

5. Registry is not necessary as between the parties, to confer a privilege under a building contract. *Roberts* v. *Hyde*, 51.

6. The assignment of a warehouse receipt, in the absence of an express stipulation, that the property is given in pledge to secure the payment of a

PRIVILEGE (*Continued*).

principal obligation, the amount of which is specified, does not confer a privilege upon the transferree. *Martin* v. *His Creditors*, 165.

7. In case of a forced alienation of a plantation, the overseer is not bound to pursue his privilege on the proceeds of the sale in the hands of the Sheriff. No sale can destroy the privilege which the law creates in favor of overseers, as long as the crop hangs by the roots, or the proceeds, when gathered are not beyond the reach of the overseer.

Scarborough v. *Stinson*, 665.

8. In case of a forced alienation of a plantation with the crop in the ground, the overseer has not a privilege on such crop, for his whole year's salary, but simply for the proportion of the year elapsed at the date of such sale.

Ibid.

9. Article 2720 C. C. accords to the laborer the whole salary contracted for, when he is discharged by his employer without sufficient cause, before the expiration of his time of service; but this is, as to the unexpired time, by way of penalty or damages. The privilege granted by Article 3184 is for a specific object, in the words of the Article, for "the appointment of salaries of the overseer for the year last past, and so much as is due of the current year." *Ibid.*

See SHIPPING—*Pousargues* v. *Steamer Natchez*, 80.
See CONTRACTS—*St. Paul's Church* v. *Giraud*, 124.
Stewart v. *Christy*, 325.
See ATTACHMENT—*Tufts* v. *Casey*, 258.
See SUBROGATION—*Succession of Will*, 381.
See SEIZURE AND SALE—*Flournoy* v. *Milling*, 473.
See STATUTES—*Baxter* v. *Sisters of Charity*, 686.

PUBLIC LANDS.

1. The Act of Congress of February 20th, 1811, exempting land sold by Congress from taxation for five years from the date of the sale, has no application to lands donated by the General Government to this State, and sold by the State. *Bishop* v. *Marks*, 147.

2. The United States surveys and approved township maps must control the action of surveyors appointed by the court to establish the boundary line between parties both of whom derive title under a patentee of the General Government. *Stewart* v. *Boyd*, 171.

3. Where the consideration of an obligation was the sale of improvements on public lands, and it appeared that the vendor, at the time of the sale, was in a situation to avail himself of the benefit of the preëmption Acts of Congress—*Held:* That the consideration was a good and valid one.

Dean v. *Wade*, 230.

4. The statutes granting a preference right to actual settlers on public lands donated to the State, were intended to benefit white persons who, being heads of families, or over twenty-one years of age, had made a settlement with a view to cultivation, and not of speculation. Actual residence is required; and the mere fact of cultivation, without residing on the land, cannot be considered a compliance with the law.

Munday v. *Muse*, 237.

5. A plat of survey made by a deputy surveyor under the Spanish Government, with his certificate that the survey was made by himself agreeably

PUBLIC LANDS (*Continued*).

to the order of the Surveyor General of the two Floridas, is not evidence of a complete Spanish grant, but only of an inchoate grant within the discretion of Congress after the acquisition of title by the United States, and subject to be entirely rejected. *Fluker* v. *Doughty*, 673.

6. Such an incomplete grant is inferior to a title derived from the Government of the United States by virtue of a legislative act of confirmation. *Ibid.*

7. Until the patent issues, an inchoate grant remains within the discretion of the grantor. *Ibid.*

8. Where there is a conflict between the certificate of confirmation by the United States of an inchoate Spanish grant and the orders of survey, the act of confirmation must prevail and determine the nature and extent of the rights of the original claimant. *Ibid.*

See SALE—*Succession of Coxe*, 514.

PUBLIC THINGS.

1. The sale of property bounded by an avenue, in a plan of a town, which is referred to in the act of sale, as designating the position of the property sold, is a dedication of the avenue to public use, and the vendee, together with the public generally, have the right to use the whole width of the avenue. *Burthe* v. *Fortier*, 9.

2. Public places within the limits of a corporation cannot be appropriated to private use, and individual corporators, as well as the officers of the corporation, have the right to prevent such appropriation, and to sue for the demolition and removal of buildings erected on them by individuals. *Stevens* v. *Walker*, 577.

3. Where a party, with the sanction of the Mayor and Common Council of the Town of Franklin, erected a wharf and warehouse upon the banks of the Bayou Teche, in front of a public square—*Held:* That such improvements were authorized by the Act of 1857, entitled "An Act authorizing front proprietors on the Bayou Teche to erect wharves and warehouses upon the forty feet from the bayou, which are dedicated to public use." *Ibid.*

4. This Act of 1857 is not unconstitutional. It does not confer unlimited power upon the municipal authorities to transfer the public property, to the exclusive use and control of individuals. The erection of the wharves and warehouses therein authorized must be subservient to commerce; otherwise the privilege is abused, and the courts will grant the public the adequate remedy. *Ibid.*

QUASI CONTRACTS.

See CONTRACTS.

RATIFICATION.

See PRINCIPAL AND AGENT—*Mummy* v. *Haggerty*, 268.
See HUSBAND AND WIFE—*Williams* v. *Springfield*, 535.
See CONTRACTS—*Decuir* v. *Lejeune*, 569.
See ACTION—*Baines* v. *Burbridge*, 628.
See DONATION—*Baines* v. *Burbridge*, 628.

RECONVENTION.

See PLEADING—*Barrow* v. *Robichaux*, 70.
Hynson v. *Wheeler*, 409.
See PRACTICE—*Smith* v. *Amacker*, 299.
See COMMUNITY—*Decuir* v. *Lejeune*, 569.
See COSTS—*Peniston* v. *Somers*, 679.

REDHIBITION.

1. The sale of a slave will be rescinded on account of the redhibitory defect of insanity, the existence of which was known to the vendor at the time of the sale. *Carreta* v. *Lopez*, 64.

2. The redhibitory action cannot be maintained on account of a disease, existing at the time of the sale, which was apparent and might have been discovered by simply inspection. *Bloom* v. *Beebe*, 65.

3. The knowledge of the agent of the vendee in possession of the slave, at the time of the sale, will be considered the knowledge of the principal. *Ibid.*

4. Where a party sold a slave, with full warranty, which he had previously purchased without any warranty, against the vices and defects prescribed by law—*Held:* That in an action brought against him by his vendee to rescind the sale on the grounds of the existence of a redhibitory disease in the slave, the fact of the exclusion of warranty in the act of sale from his vendor, is not *per se* evidence of knowledge of the existence of the disease, and the fraudulent concealment of it on his part, at the date of the sale to the plaintiff. *Belknap* v. *Kendig*, 203.

5. A party cannot succeed in a redhibitory action, when he fails to establish clearly that the disease of which the slave died, existed at the time of the sale, and when it appears that he had not resorted to medical aid for some months after the sale. *Folse* v. *Kittridge*, 222.

6. In the redhibitory action, where it is shown that the slave was so sick at a hospital as to render a bodily tender impossible, it is sufficient to show, that an offer, in writing, had been made to return the slave. *Palmes* v. *Kendig*, 264.

7. Where a slave who had been purchased a short time before, as a confirmed runaway and a vicious negro, was sold with full legal warranty, and soon after the sale ran away again, and in attempting to escape from his master, who pursued him, jumped into a river and was drowned—*Held:* That the vendor was bound to refund the price of the slave, with legal interest from the time of drowning. *Buie* v. *Kendig*, 440.

8. In a redhibitory action, the plaintiff must sue to avoid the sale and to recover back the price. Before he can recover the price, he must sue for and obtain, in the form prescribed by law, the avoidance of the sale. *Childs* v. *Wilson*, 512.

9. The right of a purchaser to recover damages for the value of animals, that have contracted a redhibitory disease, from those that were purchased, arises *ex delicto*, and cannot form the basis of a suit by attachment. *Ibid.*

10. Attorneys' fees cannot be recovered as damages, in a redhibitory action. *Burnham* v. *Hart*, 517.

REDHIBITION (*Continued*).

11. The plaintiff in a redhibitory action is entitled to recover, as damages and interest, five per cent. per annum on the price paid for the thing affected with the redhibitory vice, from the date of the sale. *Ibid.*

12. The defendant in such an action is entitled to five per cent. per annum interest, from his warrantor, from judicial demand. *Ibid.*

13. Where a physician purchased a slave, whom he had examined, some time previous to the purchase, for other parties, and had pronounced diseased, and it was shown that since the purchase he had treated the slave, and had declared that the disease was the same with which he was afflicted before—*Held:* That under such circumstances, where the slave died, the speculative opinions of physicians who had never seen the negro, were insufficient to establish that he died of any other disease, of which the purchaser was ignorant. *Virgin* v. *Dawson*, 532.

14. The decision in the case of *Dupré* v. *Démarest*, 5 An. 591, affirmed, to the effect that the speculative opinions of physicians derived from a *post mortem* examination, are not sufficient to establish the length of time during which a redhibitory disease existed in the slave before his death.
Cahn v. *Costa*, 612.

15. The conjectures of medical men as to the probable duration of a disease have not, *per se*, the weight of proof of the fact of duration.
Paty v. *Martin*, 620.

16. In a redhibitory action, where the judgment of the District Court awarded the plaintiff the price he had paid for the thing affected with the redhibitory vice, but did not rescind the sale, and the defendant appealed—*Held:* That the plaintiff, the *appellee*, could not throw upon the defendant the costs of the appeal by a prayer to amend the judgment by rescinding the sale, even if the judgment be modified in no other respect.
Boulin v. *Maynard*, 658.

17. The fact, that the purchaser of a slave allowed him to hire his own time, and even permitted him to sleep away from home, is not a forfeiture of the action of redhibition on account of the vice of running away. The question is, was the slave *at the time of the sale* in the habit of running away, and not has he acquired the habit since? *Ibid.*

18. Where the vendor of a slave was aware at the time of the sale, that he was in the habit of running away, and did not communicate the same to the vendee—*Held:* That the latter was not bound for the use of more than ordinary care in guarding the slave against running away, and that he was entitled to reimbursement for the expenses incurred in recapturing the slave. *Ibid.*

19. If a slave sold with full warranty dies of a disease contracted from exposure while a runaway, the vendor will be liable to return the price, on proof that he had requested the vendee not to send the slave back, if caught, until at a specified time, when he would either give another one in his place, or return the price. *Blair* v. *Collins*, 683.

See EVIDENCE—*Morris* v. *Kendig*, 404.

REGISTRY.

1. Where notice of title has been directly brought home to a party, it supplies the place of registry of that title; and although this knowledge has not been directly brought home to such party, it may be inferred from the circumstances of the case. *Smith* v. *Lambeth*, 566.

See PRIVILEGE—*Roberts* v. *Hyde*, 51.
See PRACTICE—*Maillon* v. *Lynch*, 547.
See EVIDENCE—*Smith* v. *Lambeth*, 566.

RELEASE.

See OFFENCES AND QUASI OFFENCES—*Irwin* v. *Scribner*, 583.
See PRINCIPAL AND SURETY—*Succession of Daigle*, 594.

RESCISSION.

See PARTITION—*Martin* v. *Martin*, 585.

RES JUDICATA.

1. The overruling of an exception before issue joined is not *res judicata* on the matters at issue; in the meantime the court may revise interlocutory decrees rendered in the course of the proceedings. *Levy* v. *Wise*, 38.

2. A judgment dismissing a claim against an insolvent estate for want of proof, and which is a judgment of *nonsuit* only, will not support the plea of *res judicata*. *Allinet* v. *His Creditors*, 130.

3. A certificate of division of opinion of the Judges in the Circuit Court of the United States, accompanied by a statement of facts to serve as the basis for an appeal to the Supreme Court of the United States, is not a final judgment which will support the plea of *res judicata*.
Anderson v. *Valentine*, 379.

REVENDICATION.

See ACTION—*Baines* v. *Burbridge*, 628.

REVOCATORY ACTION.

See ATTACHMENT—*Raulett* v. *Constance*, 423.
See PRACTICE—*Ross* v. *Pritchard*, 531.
See SIMULATION—*Sullice* v. *Gradenigo*, 582.

ROADS AND LEVEES.

1. In an action to expropriate land for a railroad, or other work of public utility, under the Act of 1855, the plaintiffs are not bound to pay the jurors for their attendance. *Vicksburg Railroad* v. *Hart*, 507.

2. A public road established by the Police Jury is subject to the use not only of the citizens of the parish in which it is established, but of the whole State, and even of strangers or foreigners within the State.
Barbin v. *Police Jury*, 544.

3. Where work to be done on roads, levees and ditches on a party's land, had been regularly adjudicated to an undertaker, according to the provisions of the Act of 1855, and upon their completion, the Road and Levee Inspector issued his certificate to the undertaker—*Held:* That in case of nonpayment, the undertaker was not entitled to an order of seizure and sale, unless the petition was accompanied by his oath, showing the amount due. *White* v. *Winn*, 552.

ROADS AND LEVEES (*Continued*).

4. *B.* contracted with the Police Jury of the parish of Avoyelles for the establishment of a public road from a certain point in the parish to his landing on Red River, for the purpose of carrying on the receiving and forwarding business—*Held:* That the private interest of *B.* was a sufficient consideration for the agreement on his part, and the incidental public advantage to the parish authorized the action of the Police Jury in the establishment of the road as a public highway.

Barbin v. *Police Jury*, 559.

See POLICE JURY—*Grass* v. *Haynes*, 181.

SALE.

1. On the trial of a revocatory action to set aside a sale alleged to be fraudulent and simulated, the plaintiff may require the Judge to charge the jury that where the vendor continues in the corporeal possession of the thing sold, the sale is presumed to be fraudulent, and proof of the simulation is dispensed with, the burthen of establishing the reality of the sale resting upon defendant. *Bachemin* v. *Chaperon*, 4.

2. A vendor in whose favor a mortgage on the property sold to him has been fraudulently erased, and who was cognizant of the fraud, cannot avail himself of such erasure. *Ibid.*

3. Where no attempt has been made by the vendee to sell or dispose of the property purchased without paying his vendor, or to conceal or cover the same, so as to defeat the latter's recourse thereon, the case does not fall within the purview of the 10th section of the Act of 1840.

Miltenberger v. *Burgess*, 8.

4. Where the land sold is described in the act of sale by reference to adjoining tenements, and sold from boundary to boundary, no action can be maintained for a diminution of price on account of deficiency in quantity.

Zeringue v. *Williams*, 76.

5. When the vendor refuses to comply with his obligation of delivering the thing sold, he waives, by such refusal, a formal putting in default.

Abels v. *Glover*, 247.

6. A party is not required to demand performance of him who has already expressly refused to perform his obligation—*lex neminem cogit ad vana.*

Ibid.

7. Although the vendee may have good cause for suspending the payment of the price, in order to relieve himself from the payment of interest, which was stipulated, he is required to make a deposit of the price.

Brother v. *Cronan*, 256.

8. Where a cargo of goods, deposited in a government warehouse, is sold, the sale is perfect by the consent of the parties, the price having been paid, and the delivery made, fictitiously, by the transfer of the warehouse receipt. *Meeker* v. *Vredenburg*, 438.

9. The Federal Government does not recognize the validity of a transfer of property deposited in one of its warehouses, before the payment of the Customhouse duties; but the importer is not debarred from disposing of property in the meantime, although it remains in the warehouse for the purpose of securing the collection of the duties. *Ibid.*

SALE (*Continued*).

10. Where property so situated was sold, but for the mutual convenience of both vendor and vendee, was suffered to remain in the warehouse, the vendee not requiring the importer to pay the duties and perfect the delivery, for a certain time, at the end of which time it was found that the warehouseman had made away with a portion of the goods—*Held:* That the property was at the risk of the vendee, and that in the absence of any want of care on the part of the vendor, he is not responsible. *Ibid.*

11. A promise to sell does not place the thing at the risk of the promissee, nor does it transfer to him the ownership or dominion of it.
Garrett v. *Crooks*, 483.

12. Where a party has made a promise to sell property to one person, and sells it to another, such sale will operate a translation of the property to the latter, although he may have had knowledge of the existence of the promise of sale to the other, unless a fraud has been committed by the vendor and vendee upon the promissee, in order to defeat his title.
Ibid.

13. Actual dispossession is not always required in order to constitute an eviction. A purchaser may be evicted, although he continues in possession of the property, if that possession be under a different title; as, for instance, if the vendee should subsequently hold under the true owner, either by inheritance or otherwise. *Succession of Coxe*, 514.

14. These principles are not applicable to the case of purchasers under the "Maison Rouge Grant," who have availed themselves of the Act of Congress passed for their relief, and have acquired the superior title of the United States. Such purchasers cannot be considered as having been evicted by the superior title of the United States, and have not the right to demand a repetition of the amounts paid by them on their purchases, from a party holding title under the grant. The title from the government must be considered as enuring to the benefit of their vendor, in aid and completion of the imperfect title transferred by him, on payment of the entrance money, and legal interest thereon from the date of the Receiver's receipts. *Ibid.*

15. Where a slave was really bought by one party, but the title was made in the act of sale to another party, who was interposed for certain purposes—*Held:* That the relation of vendor and vendee as contemplated by Article 2255 of the Civil Code, does not exist between the real purchaser in this case and the interposed party, and that such a case would not come within the provisions of that Article. *Barbin* v. *Gaspard*, 539.

16. In a case where such relation does exist, if either party when interrogated denies the sale, such denial is conclusive on the other, and testimonial proof cannot be admitted to contradict it. *Ibid.*

17. The answers of the vendor of the interposed party to interrogatories on facts and articles propounded to him, can only be regarded in the light of testimonial proof in respect to such interposed party *Ibid.*

18. Parol testimony to show fraud or simulation in a sale of immovable property or slaves of an ancestor, to the prejudice of the legitime of the forced heirs, may in a certain class of cases be introduced; but such evidence

SALE (*Continued*).

never can be introduced by the heirs, without the consent of the adverse party, to show title in the ancestor to such property, for the purpose of increasing the amount of the assets of his estate. *Ibid.*

19. Testimonial proof is not admissible for the purpose of proving that a third person was interposed to receive, or to be invested with, title to real estate or slaves, for the use of, and instead of the intended vendee. *Ibid.*

20. The plaintiff in execution, and consequently one cognizant of the facts and claiming through him, is not "*a person having an interest to annul* a forced alienation for the want of those formalities required by law in such alienations." On the contrary, his interest seems to be, to maintain the validity of the forced alienation made at his instance, and for his benefit.
McIlhenny v. *Barbin*, 548.

21. Curators, administrators, &c., are expressly prohibited from purchasing, directly or indirectly, property administered by them.
Dugas v. *Gilbeau*, 581.

22. The only exception to the prohibition is the one in favor of the surviving partner in community, or ordinary partnership, or an heir or legatee of the deceased. *Ibid.*

23. Where a bill of sale of a slave did not declare that the property was *delivered*, but contained the declaration that it was bargained and sold to the vendee, and concluded with the usual warranties—*Held:* That such a contract of sale was complete, and the property was at the risk of the buyer. *Walker* v. *Hays*, 640.

24. What was said in *Smoot* v. *Russell*, 1 N. S. 528, was in relation to the construction of an instrument. *Ibid.*

25. Where a forced heir sued to set aside a sale made by his ancestor, upon the ground that it was a *disguised donation* and operated to his injury—*Held:* That the burden of proof was on him to show that no price had been paid for the property, or that the price was below one-fourth of the real value of the property, at the time of the sale. *Carter* v. *McManus*, 641.

26. Where the evidence in such a case is so slight as to create but a suspicion against the payment of the price, and to make out in favor of the heir but a doubtful case, is too uncertain to justify the court in setting aside the sale. *Ibid.*

27. Where property was sold with the agreement that the vendee was to retain a certain portion of the price until the vendor had procured the release of the interests of other parties in such property, and prior to the performance of this condition, the vendee transferred the property to another person without mention of the incumbrances—*Held:* That the fact of the subsequent purchaser's taking possession of the property, and his payment of the balance which was to have become due to the original vendor upon his performance of the condition, does not prevent him, when sued by his immediate vendor, from insisting upon the performance of the condition.
Forbes v. *Drumm*, 707.

See ACTION—*Bachemin* v. *Chaperon*, 4.
See HUSBAND AND WIFE—*Henderson* v. *Fort*, 383.
See MORTGAGES—*Clarke* v. *Peak*, 407.
See PRACTICE—*Jacobs* v. *Sauvé*, 424.
See EXECUTION OF JUDGMENT—*McIlhenny* v. *Barbin*, 548.
See DONATIONS—*Harper* v. *Pierce*, 666.

SALE, JUDICIAL.

1. Where the decree of the court recognizes the necessity of a sale of the property of an intestate, to pay debts due by his succession, and the purchaser is in good faith, his title cannot be questioned, although the debts might have been paid by the future revenues of the crops.

Savage v. *Williams*, 250.

2. The administrator has the right to apply in good faith for the sale of property to pay debts, but he has no right to incumber such sale, by requiring the purchaser to buy other property than that of the deceased, nor to demand a larger proportion of cash than the wants of the succession may require; and if he, himself, become the purchaser at such a sale, it cannot be maintained. *Ibid.*

3. Where the surviving partner in an ordinary partnership is the administrator of the deceased partner's succession, he has the capacity, by the express provisions of the Act of 1854, to purchase at a succession sale of his effects. *Ibid.*

4. The adjudication of a slave woman at Sheriff's sale does not pass the title to her child under ten years of age who has been neither seized, advertised nor sold. *Nouvet* v. *Bollinger*, 293.

5. The doctrine in the case of the same plaintiffs v. *McCall*, 13 An. 215, affirmed, to the effect that, where, in a forced sale of property, a change in the terms of the sale more favorable to the seized debtor is made, such change will not invalidate the sale; it will be presumed to have been made at the instance of the debtor, and he is estopped from contesting it.

Nicholls v. *Mercier*, 370.

6. In a suit by attachment, the garnishee in his answers having acknowledged himself indebted to the defendant in the amount of sundry notes and judgments, which were not seized, being in the State of Mississippi, the plaintiff, instead of having judgment entered up against the garnishee for the amount claimed in his petition, obtained judgment against the defendant *with privilege* on the property attached, and under a writ of *fieri facias*, caused the right, title and interest of the defendant in the notes and judgments to be seized and sold—*Held*: That the sale was null for want of an actual seizure, by the Sheriff, of the notes and judgments.

Anderson v. *Valentine*, 379.

7. The fact, that property sold by a Sheriff under execution, did not belong to the debtor in execution but to the *plaintiff* in execution himself, does not render the alienation void. A person cannot sell the property of another, but he can sell his own property in any manner that he sees fit, provided no law is violated, and no person is injured thereby.

McIlhenny v. *Barbin*, 548.

8. In a judicial sale of land mortgaged to secure the payment of stock, where the amount of the adjudication does not exceed the amount of the stock mortgage, the sale is null—such a defect is not a mere informality, which can be cured by the lapse of five years. *Haynes* v. *Courtney*, 630.

9. The mere absence of the tutor and under-tutor at the taking of an inventory of property held in common between a minor and another party, for the purpose of effecting a partition by sale, after they have been duly no-

SALE, JUDICIAL (*Continued*).

tified to attend, or their refusal to sign the proces-verbal, without a formal protest, can afford no ground upon which to annul the sale.
Gernon v. *Bestick*, 697.

10. Thirty days notice is requisite to the validity of a judicial sale of landed property and slaves. *Ibid.*

11. Where lots of ground have been separately appraised, the Sheriff should, unless otherwise directed by the judgment, sell them separately. *Ibid.*

See COURTS—*Smelser* v. *Blanchard*, 254.
See ROADS AND LEVEES—*White* v. *Winn*, 552.
See MINORS—*Carter* v. *McManus*, 641.
See INSOLVENCY, &c.—*Shropshire* v. *His Creditors*, 705

SALVAGE.

See SHIPPING—*Marcy* v. *Chambers*, 77.

SEIZURE AND SALE.

1. Where a party holds goods merely as security for a debt, with a privilege on the same, he has no right to prevent the seizure of the goods by another party also claiming a privilege against the owner. The right of a party holding goods in this manner, is limited to a judicial proceeding to make his privilege available against the goods. *Flournoy* v. *Milling*, 473.

2. The Sheriff, when resisted in the execution of a writ, is justifiable in using so much force as is necessary to make the seizure commanded in the writ. *Ibid.*

See SALE, JUDICIAL—*Anderson* v. *Valentine*, 379.
See OFFENCES AND QUASI OFFENCES—*Atkinson* v. *Atkinson*, 491.
See EXECUTION OF JUDGMENT—*Prather* v. *Bobo*, 524.

SEPARATION.

See HUSBAND AND WIFE—*Raiford* v. *Thorn*, 81.

SEQUESTRATION.

1. The decision in the case of *Levois* v. *Gerke*, 12 An. 828, affirmed, to the effect that the proceeding by sequestration, under the Act of 1826, against the property of an insolvent who has absconded, is a different and distinct proceeding from that under the insolvent laws for a forced or voluntary surrender. *Tufts* v. *Casey*, 258.

2. Where property sequestered is bonded, the delivery of it to the party bonding, does not make him the owner and enable him to dispose of it at pleasure. *Pagett* v. *Curtis*, 451.

3. The Act of 1839, amending Article 275 of the Code of Practice, which establishes the cases in which a sequestration may be ordered, forms part and parcel of that Article, and the legal effect of the amendment is the same as if the Article were reënacted, with the words of the amendatory Act inserted in its text. *Mabry* v. *Tally*, 562.

4. The decision in the case of *Wells* v. *St. Dizier* re-affirmed, to the effect that, an affidavit for a sequestration embracing several of the alternatives of Article 275 of the Code of Practice, as amended, is sufficient in law. *Ibid.*

SEQUESTRATION (*Continued*).

5. The addition, in such an affidavit, of another of the legal alternatives contained in the Article, will not vary the principle. *Ibid.*

6. Facts stated in an affidavit for a writ of sequestration are, by legal presumption, taken *prima facie* as true on the oath of the affiant, until the contrary is shown by sufficient proof. *Carter* v. *Lewis*, 574.

7. In a suit between parties with reference to the title to land and slaves, where the agent of the plaintiff sequestered the property upon his own affidavit, and the defendant moved to dissolve the writ of sequestration, upon the ground that the agent was without authority to take that proceeding—*Held:* That an authorization from the plaintiff to his agent to get possession of the property, although the defendant should object to giving it up, cannot be presumed to mean that the agent should take possession by force and violence, but on the contrary, by process of law, and is sufficient therefore, to authorize the agent to make the affidavit and execute the bond in order to obtain the writ of sequestration. *Ibid.*

8. New grounds for the dissolution of a writ of sequestration cannot be made, on appeal, in the Supreme Court, especially when there has been no formal written assignment of errors. *Ibid.*

9. A suit by sequestration is a *lawful act*, and according to the general rule of law, the plaintiff would not be liable at all in damages for the exercise of this right,—but is made liable in such a case for any actual damage, in the event of his failure in the suit, which the sequestration may have occasioned; this is an exception to the general rule.
Broxton v. *Bloom*, 618.

SERVITUDE.

1. Article 695 C. C. giving to a proprietor whose lands are enclosed a right of way to the public road, through the estate of his neighbors, *for the cultivation of his estate*, does not restrict the right of the owner of lands so situated to claim the servitude of passage only for planting purposes.
Littlejohn v. *Cox*, 67.

2. The purport of the law is more general, and its object is to enable the owner to enjoy his property in the manner which he may deem the most profitable. *Ibid.*

3. In exercising this right of passage, the road should be located in a place where it would be least injurious to the person on whose estate the passage is granted; and at the same time proper regard should be had to the interest of the party claiming the right of way. *Ibid.*

4. Where a natural drain exists on one estate in favor of another, the mere fact that the owner of the estate in favor of which such servitude exists cuts a ditch or canal leading such water into the drain, as would, if left in a state of nature, find its way by a slow process, is not such an aggravation as would be unauthorized, where it has for its object the interest of agriculture, and does not tend to redeem swamp lands, or to turn the natural course of water into another direction. *Sowers* v. *Shiff*, 300.

5. The servitude of light and sight is continuous and apparent, and may be imposed by the owner of two lots on one in favor of the other. But the

SERVITUDE (*Continued*).

right of way through an alley is a discontinuous servitude and can under no circumstances result from the "*destination du père de famille.*"
Cleris v. *Tieman*, 316.

6. Where the right to open a canal on a certain tract of land, was transferred to a company, who allowed thirty years to elapse, after the contract was made, without attempting to avail themselves of their rights, but, on the contrary, by their own acts rendered the servitude impracticable—*Held:* That the right was extinguished, and the transferror entitled to receive back the land free from the servitude created thereon.
Marigny v. *Pontchartrain Railroad*, 427.

7. The upper estate is entitled to a natural servitude upon the estate situated below it, for purposes of drainage; levees or dams erected across a bayou, which runs through the two estates, by the proprietor of the lower, to prevent the flow of the waters in this stream, are infringements of the right of servitude appertaining to the upper estate.
Hooper v. *Wilkinson*, 497.

8. This is a right of servitude which the proprietor of the upper estate possesses; and in the enjoyment of this right he should not be disturbed or molested, although possibly no actual injury might result from the interruption of the right. *Ibid.*

9. The proprietor of an estate has a right to perform artificial drainage, but not so as to pervert the right of servitude, as originating from the natural situation of the place. *Ibid.*

10. A proprietor is not entitled to divert the flow of waters on his plantation, from the front to the rear, so as to effect his drainage in an opposite direction, to the detriment of other adjoining proprietors. *Ibid.*

11. A real servitude, to be valid, should express and describe the estate in favor of which it is established, especially where it is shown that the party claiming such servitude was the owner of several estates at the time the servitude was acquired. *Declouet* v. *Borel*, 606.

12. The proprietor of the upper estate has no right, in the exercise of the servitude of drain which exists in favor of his estate upon the lower, to divert the flow of waters from their natural course, upon the ground that it is beneficial to the lower estate: this is a matter which concerns only the proprietor of such lower estate. If he prefers that the servitude be exercised at a spot more or less injurious or beneficial to himself, it is his own look out; and the only question is, how the waters naturally flow.
Barrow v. *Landry*, 681.

13. According to the provisions of Article 656 of the Civil Code, the proprietor of the upper estate is not prevented from cultivating his fields and facilitating their drainage on the lower estate; but the act of draining other land than that belonging to his estate, upon the lower estate, is a violation of this Article, which declares that "The proprietor above can do nothing whereby the natural servitude due by the estate below may be rendered more burdensome." *Ibid.*

14. The proprietor of the lower estate has no right to erect a dam or levee by which to prevent the exercise of the servitude of drain due the upper

SERVITUDE (*Continued*).

estate, although such servitude may have been aggravated. In such a case, the proper remedy is by injunction. *Ibid.*

SHERIFF.

1. The Sheriff is without capacity to certify a waiver of citation; such waiver must either be made in express terms of record, or may be inferred from the appearance of defendant in person or by attorney.
Shannon v. *Goffe*, 86.

2. Where a party in the capacity of Sheriff has the custody of slaves, the mere fact of his removing them from the Parish Prison, to his own place, will not make him liable for their hire. He only becomes responsible for their forthcoming and for the value of such services as he might derive from their labor. *Callaway* v. *Bobo*, 467.

See COSTS—*Owens* v. *Davis*, 22.
Parker v. *New Orleans*, 43.
Decuir v. *Lejeune*, 216.
See CRIMINAL LAW—*State* v. *Joshua*, 118.
See PLEADING—*Lea* v. *Terry*, 159.
See OFFENCES AND QUASI OFFENCES—*Bogel* v. *Bell*, 163.
Brainard v. *Head*, 489.
See EXECUTION OF JUDGMENT—*Avery* v. *Police Jury*, 223.
Succession of Caldwell, 617.
See MORTGAGES—*Cummings* v. *Erwin*, 289
See PRACTICE—*Eldridge* v. *Milling*, 513.
See EXECUTORY PROCESS—*Taylor* v. *Pearce*, 564.
See JURISDICTION—*Ney* v. *Richard*, 603.
See INSURANCE—*Parker* v. *Union Insurance Co.*, 688.

SHIPPING.

1. Where the masters of two boats agree to go to the assistance of a ship that is grounded, for the purpose of getting her of, and to share the profits of the expedition equally between them, but before they reach her discover that she is afloat, and one of them turns back and the other pursuing her course, accidentally discovers passengers belonging to the distressed vessel and affords them relief—*Held:* That the adventure terminated when the first boat turned back: and that her demand for the division of salvage in this case should be rejected. *Marcy* v. *Chambers*, 77.

2. The 9th section of the Act of 1855, relative to steamboats, gives a privilege upon the boat, to the person who may have suffered damage by the want of skill, or carelessness in the management of the boat, for the amount of damages awarded him.
Pousargues v. *Steamer Natchez*, 80.

3. The right of the master of a vessel to sell the cargo, in case of necessity, for the benefit of all concerned, recognized in certain cases by the commercial law, for the benefit of navigation, is an exception to the general rule contained in Article 2427 of our Code, and must be strictly construed.
Graham v. *Underwood*, 402.

4. Where a cargo is sold without such a necessity as will justify the sale, it is an act of barratry on the part of the captain, and confers no title upon the purchaser. *Ibid.*

SHIPPING (*Continued*).

5. Where a ship was chartered, and by the terms of the charter party it was stipulated that the charterer should advance the expenses of the ship to a certain amount, and he consigns her to a person at the port from which the cargo is to be shipped, who makes these advances in his stead—*Held:* That if the consignee was cognizant of the terms and conditions of the charter party, in the absence of any express agreement to the contrary, he must be considered as having advanced funds for his principal, the charterer, and has no action for reimbursement against the ship owner or captain. *Held*, also: That although the captain had requested him to have his bill made out, and had stated that it would be paid by a party whom he named, yet this would give him no right of action against the captain. *Maury* v. *Watts*, 430.

6. An engagement to advance the expenses of a ship, under such circumstances, cannot be understood as giving the party advancing the right to instant payment where the advances are made, and as a consequence, the right to attach the ship. *Ibid.*

7. Where a vessel had been thus attached and released, and upon a final judgment decreeing her to be liable, was again seized, she having in the meanwhile passed into the hands of different owners—*Held:* That the presumption was, that she belonged to the same owners with whom the contract of affreightment had been made, and that her registry not being recorded in our customhouse, her owners at the time of the last seizure were bound to make proof of the change of ownership, and the seizing creditors could not be held liable for more than nominal damages. *Hunter* v. *Bennett*, 715.

See OFFENCES AND QUASI OFFENCES—*England* v. *Gripon*, 304.
Brannan v. *Hoel*, 308.
Howes v. *Steamer Red Chief*, 321.

SIMULATION.

1. The heirs at law cannot assert and prove simulation in the contracts made by the person from whom they inherit. *Collins* v. *Pratt*, 42.

2. In cases of fraud and simulation, parol evidence may be introduced by third persons, to contradict or vary the contents of written instruments. *Davis* v. *Stern*, 177.

3. Conversations or admissions of the parties implicated in the fraud or simulation may be offered by creditors, the objection to such evidence going to the effect or weight of it, when the declarations are not made in the presence of the other party. *Ibid.*

4. Where a sale is clearly a simulated one, a subsequent as well as an antecedent creditor may treat it as a nullity. *Ibid.*

5. Where a promissory note or a judgment has been transferred to a third person, for the purpose of defeating the legal pursuits of creditors, and the transfer is a simulation, a creditor may disregard such transfer and attach them, without resorting to the revocatory action and making the transferree a party to the suit. *North* v. *Gordon*, 221.

6. A direct action is indispensable in order to defeat a fraudulent contract; and only in cases of fictitious contracts, or pure simulations, can the

SIMULATION (*Continued*).

creditor cause the property to be seized and sold in utter disregard of the deed of transfer. *Van Ostern* v. *Simmons*, 302.

7. In actions which involve the question of simulation, great latitude is permitted in the introduction of proof, and officers may be called upon to state anything which does not directly contradict their return, although the same may be connected with other and extraneous proof which shall have the effect of showing that the officer was mistaken in such return. *Leverich* v. *Adams*, 310.

8. A creditor is entitled to levy upon property which has been transferred by his debtor, without resorting to the ordinary action, where such transfer is a pure simulation. *Holmes* v. *Barbin*, 553.

9. A Sheriff's sale cannot be considered as a mere simulation, unless the seizing creditor was a party to the transaction. *Ibid.*

10. The continued possession by a seized debtor of the property sold under execution, cannot be considered as a badge of simulation as regards the seizing creditor, who is seeking the payment of his claim, and whose claim is satisfied by the proceeds of the sale. *Ibid.*

11. Where the debtor transfers his property for the purpose of injuring his creditors, and actually does injure them, although the sale may not be a simulation, they are entitled to a direct action of nullity to secure themselves. *Ibid.*

12. An act of sale to a slave, of his freedom, which is a simulation, cannot produce any effect. *Louisiana* v. *Baillio*, 555.

13. If the master, intending to emancipate his slave, makes a sale to the slave of his freedom, without any consideration, it is void for the want of the formalities prescribed by law for manumission. *Ibid.*

14. Where the vendor of property remains in possession up to the time of his death, it cannot be recovered from his succession under a title by transfer from the deceased, unless the claimant establishes good faith and the reality of the sale. *Ibid.*

15. Where the husband purchased the dotal property of the wife under an administrator's sale, made for the ostensible purpose of paying debts of the succession, to which the wife was heir, but with the real intention of divesting the property of its dotal character, so as to remove the obstacle of dealing in regard to it with third persons—*Held:* That it was a simulation, and that the adjudication to the husband was an absolute nullity. *Decuir* v. *Lejeune*, 569.

16. The curator of an estate, as the representative of the creditors, has the right to attack a sale of property made by the deceased, as being simulated, where the succession would be insolvent if such property is abstracted from the mass. *Sullice* v *Gradenigo*, 582.

17. The revocatory action may be instituted by a syndic, or administrator, without regard to the date or origin of the claims of the creditors. *Ibid.*

18. Where the vendor remains in possession under a clause in the contract of sale, the vendee, in order to recover the property, must rebut the presumption of simulation, by establishing the reality of the transaction. *Ibid.*

SIMULATION (*Continued*).

19. The declarations of the vendor made after the sale, though out of the presence of the vendee, acknowledging that the sale was simulated, are admissible against the vendee to prove fraud in the vendor; but such evidence alone is insufficient to establish fraud in the vendee.
Carrollton Bank v. *Cleveland*, 616.

20. The appreciation of the circumstances showing complicity on the part of the vendee, in the fraud practiced by his vendor, is a matter peculiarly within the province of the jury; and where the record of conviction of fraud and simulation in a contract of sale discloses the fact that the property remained in the possession of the vendor after the sale, the Supreme Court will not disturb the verdict of the jury. *Ibid.*

21. In an action by the creditors to annul a simulated sale of their debtor's property, such creditors enjoy privileges which would be denied to the debtor. *Nouvet* v. *Vitry*, 653.

22. But in a suit to make out title for their debtor, the rights and privileges of the creditors are precisely the same as those of the debtor himself.
Ibid.

23. Children being forced heirs, claim not merely as the representatives of their ancestor, but from the law, and may allege and prove by parol fraud or simulation vitiating the acts of their ancestor. *Hoggatt* v. *Gibbs*, 700.

See ACTION—*Bachemin* v. *Chaperon*, 4.
See PLEADING—*McQueen* v. *Sandel*, 140.
See DONATIONS—*Johnson* v. *Alden*, 505.
See SALE—*Barbin* v. *Gaspard*, 539.
See EXECUTION OF JUDGMENT—*Holmes* v. *Barbin*, 553.
See EVIDENCE—*Bowman* v. *McElroy*, 663.

SLAVES AND STATU LIBERI.

1. Where, by the terms of a will made in Arkansas, certain slaves were to be set free as soon as two-thirds of their appraised value should be paid to the heirs of the testator for their hire—*Held:* That one of the slaves sold in this State was entitled to his freedom, upon showing that the amount required to be realized by him had been realized.
Bateman v. *Frisby*, 58.

2. Under Art. 10 of the Civil Code, the form and effect of a deed of manumission made in another State is governed by the laws of the State where it was made, and where it is to have its effect. *Foster* v. *Mish*, 199.

3. In giving effect to such a deed made in a State where the common law is known to prevail, the Supreme Court will judicially take cognizance of this fact and will give full effect to the deed, if it is sufficient in form and effect in the common law States of the Union, in the absence of statutory enactments to the contrary, to confer upon a slave a full and perfect title to his freedom. *Ibid.*

4. The Act of 1857, prohibiting the emancipation of slaves, does not prevent a free person of color who has been wrongfully and illegally deprived of his freedom, from bringing a suit to recover his liberty. *Ibid.*

5. Where the testator had directed his slaves after a certain period to be emancipated and sent to Africa, and some of them were held in indivision with his partner, who refused to give his consent to the emancipation, and

SLAVES AND STATU LIBERI (*Continued*).

became the purchaser from the heirs of their undivided half of the negroes —*Held:* That the provisions of the will in regard to such of the testator's negroes became inoperative. *Rost* v. *Doyal*, 265.

6. The Act of the Legislature relative to slaves, approved March 19th, 1857, does not contravene Art. 115 of the Constitution, which declares that "Every Act of the Legislature shall embrace but one object, and that shall be expressed in the title." *State* v. *Henry*, 297.
7. A slave cannot be sentenced to punishment after he has been acquitted by the finding of the jury and the magistrates. *State* v. *Solomon*, 463.
8. The engagements and stipulations made in favor of a slave are not absolutely null and void, and cannot be utterly disregarded and treated as pure and simple nullities by all mankind, but only by such persons as have an adverse interest. *Maillon* v. *Lynch*, 547.
9. A purchase made by a slave cannot be inquired into and disturbed by one who is not affected by it; for as to such a one, if the object of the contract of sale does not belong to the slave, it enures to the benefit of the master, who alone is at liberty at any time to claim the object; and the fact that, apparently, the owner has not exercised his right, will not enable a party, who has failed to show any adverse interest in himself, to disturb the purchase made by a slave. *Ibid.*

See PRINCIPAL AND SURETY—*Levy* v. *Wise*, 38.
See DAMAGES—*Maille* v. *Blas*, 100.
See CRIMINAL LAW—*State* v. *Keeper of Parish Prison*, 347.
See SIMULATION—*Louisiana* v. *Baillio*, 555.

SOLIDARITY.

See BILLS OF EXCHANGE &c.—*Shreveport* v. *Gooch*, 474.
See OFFENCES AND QUASI OFFENCES—*Irwin* v. *Scribner*, 583.

STATUTES.

1. The Act of the Legislature requiring the City Council to pass an ordinance levying a special railroad tax in the month of January of each year, is merely directory as to the time, and such ordinance is valid, although passed at a later period. *New Orleans* v. *Mechanics' and Traders' Bank*, 107.
2. The Act of the 20th March, 1856, was not intended to repeal the Act of the day previous; they can be construed together. *Ibid.*
3. An Act cannot govern the decision of a case which is based upon a contract made prior to the passage of the Act. *Weaver* v. *Maillot*, 395.
4. There is nothing in the Act of March 2d, 1860, in conflict with Article 8 of the Civil Code; the latter is therefore unrepealed and in force upon the subject-matter of the Act. *Ibid.*
5. Under the provisions of the Act of 1855, relative to the Mechanics' Lien, it is necessary to submit an arbitration in *writing*, and if, in point of fact, there was not a written submission, the award is not binding. *Baxter* v. *Sisters of Charity*, 686.
6. The statute above mentioned requires that the contractor should signify his assent or dissent to the owner, within ten days after being notified of the claim of his journeyman, or other person, for work performed; but this is a matter which concerns only the contractor and the owner. A payment made to a claimant after the lapse of ten days, and before the contractor

STATUTES (*Continued*).

has notified his dissent to the owner, will be binding as between the two latter, the law presuming assent from the silence of the parties. This presumption, however, is not absolute, and, at any time before payment, the contractor may object to the correctness of a demand. *Ibid.*

See TAXES, TAX SALES, &c.—*New Orleans* v. *Southern Bank*, 89.
See CRIMINAL LAW—*State* v. *Parker*, 231.
See SLAVES—*State* v. *Henry*, 297.
See EVIDENCE—*Taylor* v. *Smith*, 415.

SUBROGATION.

1. When, by the contract of lease, the lessee undertakes to pay the taxes to be thereafter assessed upon the property leased, if he fails to do so, the lessor, having an interest, as owner, in discharging the debt, would, upon paying the same, become legally subrogated to the rights of the State or city against such lessee. *Succession of Will*, 381.
2. But where the lessor, thus legally subrogated, has failed to prosecute his rights, until, by the lapse of time, the privilege of the State or city has been lost, he would have no privilege, since he cannot claim a higher right than theirs. *Ibid.*
3. The conventional subrogation must be made at the time of the payment. *Sewall* v. *Howard*, 400.
4. Subrogation cannot take place, by effect of law, beyond the amount actually disbursed. *Shropshire* v. *His Creditors*, 705.
5. Where parties are liable jointly as principal debtors, and one of them discharges the debt, subrogation takes place only for the share of his co-debtor. *Ibid.*
6. An express subrogation is necessary to enable the purchaser of a tract of land to exercise against the party from whom the title was acquired, the rights of his vendor, arising out of a deficiency in the quantity of the land, which would have entitled his vendor to the action of *quanti minoris*. *Chambliss* v. *Miller*, 713.

See PAYMENT—*Sturges* v. *Taylor*, 285.
Oliver v. *Bragg*, 402.
See PRINCIPAL AND SURETY—*Succession of Daigle*, 594.

SUCCESSIONS.

1. Where it is shown that a person claiming an estate is the legal heir of its deceased proprietor, in the absence of proof that there are other heirs, he will be considered the *sole* heir. *Samford* v. *Toadvine*, 170.
2. The transfer in usufruct, of the effects of a succession to the widow in community, made by the legal heir, is an act of heirship which vests the whole succession unconditionally in such heir; it is an acceptance of the succession purely and simply. *Ibid.*
3. Under such circumstances, the property is vested in the heir, and not in the succession, and the administrator cannot disturb the heir, or those holding under him, in their possession. *Ibid.*
4. An account of an administrator is rendered to the creditors and heirs of the estate which he administers, and one who claims property mentioned as belonging to himself, and not to the succession administered, will not be permitted to assert such claim by way of opposition to the administrator's account. *Cathey* v. *Kerr*, 228.

SUCCESSIONS (*Continued*).

5. Where property has been sold by an administrator, and for want of proper parties the sale is rescinded, it cannot be taken from the administrator, but must be left in his hands to be administered according to law. *Savage* v. *Williams*, 250.

6. The child is bound to collate, in the partition of the succession of his father, the amount of his debts assumed by his father and paid by the succession. *Succession of Tournillon*, 263.

7. Money paid by the grand-father for the tuition of his grand-child, although he gives his note or draft for the amount, must be collated by the child at the partition of his father's succession. *Ibid.*

8. Where a child claims property in the possession of his natural father, on the ground that it was acquired by the joint labor of the father *and deceased mother*, courts of justice are bound to discountenance pretensions based upon such an immoral connection, by demanding strict and conclusive proof, before affording relief. *Rochelle* v. *Hezeau*, 306.

9. The terms father and mother, used in Art. 1481 of the Civil Code, refer only to the *legitimate* father and mother of the disposer. *Wood* v. *January*, 516.

10. The natural parent cannot claim, as forced heir, any portion of the estate of his deceased illegitimate child, as against the universal legatee and instituted heir. *Ibid.*

11. There can be no irregular succession, much less forced heirship, where the illegitimate child disposes of his whole estate by will. *Ibid.*

12. Decision in the case of *Stewart* v. *Stewart et al.*, 13th An. 398, reaffirmed, to the effect that, under the Act of 1852, entitled "An Act to provide a homestead for the widow and children of deceased persons," if the widow and children had the sum of $1000 belonging to all or either of them, nothing could be withdrawn from the estate, even should it happen that the widow or one minor heir was in necessitous circumstances and did not possess $1000. *McCall* v. *McCall*, 527.

13. Where property belonging to a succession had been inventoried in the Second District Court of New Orleans, and had been ordered to be sold by that court for the payment of debts—*Held:* That a subsequent order of seizure and sale granted by the Sixth District Court against the same property, upon a mortgage by notarial act, was in conflict with the assumed jurisdiction of the former court, and therefore, irregular. The mortgagee, in such a case, ought to have applied to the court issuing the first order, for a modification of the terms of the sale, if he was not satisfied with them. *Poutz* v. *Bistes*, 636.

14. Where the object of a sale of succession property is the payment of debts, citation to the heir, and the advice of a family meeting, are not required by law. *Carter* v. *McManus*, 676.

15. Personal citation to the heirs is necessary to render the judgment homologating an administrator's final account binding as between the heirs and the administrator; but as between the *heirs* and *creditors* of the succession, it has been held that the homologation is binding without *personal* citation or notice, when the notice has been given as required by Art. 1057 of the Civil Code. *Ibid.*

SUCCESSIONS (*Continued*).

16. The law makes no distinction between the beneficiary heir who is a creditor (although he be the administrator), and the other creditors; and the judgment homologating an administrator's account, when the administrator is both heir and creditor, is binding on the other heirs, without personal citation to them. *Ibid.*

See EXECUTORS AND ADMINISTRATORS—*Serret* v. *Labauve*, 186.
Cooper v. *Cotton*, 214.
See CLERKS OF COURTS—*Succession of Spivey*, 248.
See WARRANTY—*Winn* v. *Dickson*, 273.
See PARTITION—*Succession of Montamat*, 332.
See COMMUNITY—*Breaux* v. *Carmouche*, 588.
See PARTNERSHIP—*McKowen* v. *McGuire*, 637.
See MINORS—*Carter* v. *McManus*, 641.
See COLLATION—*Hoggatt* v. *Gibbs*, 700.

SURETY.

See PRINCIPAL AND SURETY.

TAXES, TAX SALES AND TAX COLLECTORS.

1. When, in an assessment of a lot of ground, neither the number of the square, nor the number of the lot, nor the name of the street on which the lot fronted, is given, such assessment is wanting in particulars essential to the identification and description required by the 26th section of Revenue Act of 1847, which requires the tract or lot of land to be designated at least by its boundaries. *Woolfolk* v. *Fonbene*, 15.

2. When the assessment is not made in the manner required by law, a sale of the property assessed for taxes by the Collector, will be null. *Ibid.*

3. An illegality in the assessment of property sold for taxes is a radical defect, and not a mere informality which may be cured by the lapse of five years from the date of the tax sale. *Ibid.*

4. Where property has been omitted in the general State assessment, a supplemental assessment may be afterwards made, and in this case it is not necessary that the formalities of time, manner and place, required by law, should be observed. *New Orleans* v. *Southern Bank*, 89.

5. The ordinance of the Common Council of the city of New Orleans, approved the 25th of March, 1857, levying a tax on the capital of banks, was subsequent to the Act of the 19th of March, 1857, exempting free banks from taxation, and in conflict with that Act, and is therefore void. The statute of the 19th of March, 1857, applies only to the future. It is from and after the passage of this Act, that the capital of free banks shall be exempt from taxation. "A law can only prescribe for the future; it can have no retrospective operation, nor can it impair the obligation of contracts." Art. 8, C. C. *Ibid.*

6. But the ordinance of the 23d of February, levying a special railroad tax, was legal at the time it was passed, and as it conferred equitable, if not vested rights, upon the bond holders, could not be repealed, if susceptible of repeal, except by some positive provision of law or the clearest and most patent implication. *Ibid.*

TAXES, TAX SALES AND TAX COLLECTORS (*Continued*).

7. The 117th section of the Act of 1856, which was intended to amend an Act entitled "an Act to consolidate the city of New Orleans, and to provide for the government of the city of New Orleans, and the administration of the affairs thereof," contemplated that the special railroad tax should be levied after the assessment roll was completed.

New Orleans v. *Union Bank*, 123.

8. When an appeal is taken from a decree rendered on an application for a monition, and confirming a tax sale, and neither the assessment roll, nor the ordinance of the Police Jury levying the tax, nor any adjudication of the property, nor Sheriff's deed, has been offered in evidence, the decree will be reversed. *In the matter of Peyton Bond*, 129.

9. The decision in the case of *Louis Selby* v. *Levee Commissioners*, 14 An. 435, affirmed. *Bishop* v. *Marks*, 147.

10. By the Act of 1856, a distinction is made between property belonging to charitable institutions which is in use for the purpose of exercising the charitable objects of the institution,—as for instance, the asylum,—and other property belonging to the association and yielding revenues to its coffers. The former is exempt from taxation, while the latter has not the benefit of this exemption.

New Orleans v. *Congregation Dispersed of Judah*, 389.

11. The first and second sections of the statute approved January 29th, 1858, amendatory of sections 103 and 104 of the City Charter, approved March 12th, 1857, do not make the payment of the taxes therein mentioned from January 1st to March 1st annually, dependent as to time on the will of the contributors, but simply suspends, until after the 1st of March, the action of the city to enforce its lien on the personal property of the delinquents, or to sue out an injunction, as provided by law.

New Orleans v. *Clark*, 614.

12. The city ordinance imposing a tax of $25 on each *printing* office doing job work, does not refer exclusively to printing offices publishing a newspaper and doing job work conjunctively, but to *any printing office* doing job work. *Ibid.*

See MORTGAGES—*Ranney* v. *Burthe*, 343.

TRUST.

1. A citizen of Louisiana, being in the State of New York, executed a deed of trust in conformity to the laws of that State, whereby he conveyed to a citizen of New York a certain sum of money in cash, upon trust, for the use and benefit of other parties—*Held:* That such a contract was not in violation of the laws of Louisiana, since it was made and executed in another State, bearing upon a fund in that State, and admitted to be according to the laws of that State. *Hullin* v. *Fauré*, 622.

2. Where a fund is thus placed in trust, to be held for the benefit of a certain person during his life, and to be paid over, at his death, to another person specified—*Held:* That such specified person cannot be considered as deriving title from the beneficiary, whose estate was a mere life estate in the fund. *Ibid.*

See MORTGAGES—*Watson* v. *James*, 386.

TUTORS AND TUTORSHIP.

1. By Articles 402 of the C. C. and 962 of the C. P., the law on the subject of tutorship is made applicable to the curatorship of interdicted persons in respect to many matters, and particularly in reference to the oath, the inventory and the security. *Interdiction of Rochon*, 6.

2. By this law, the District Judge, in fixing the bond of a curator of an interdicted person, is vested with a discretionary power over a portion of the amount, which is to constitute the sum of the bond; and the law makes it his duty to embrace in the bond: 1st. An amount equal to the active debts; 2ndly. The money and other movable effects stated in the inventory; and, 3dly. Such other sum as he shall deem sufficient to cover any loss or damages which the curator may occasion the interdicted person by mal-administration of his estate. *Ibid.*

3. This discretion vested in the District Judge, is a legal discretion, and may, in a proper case, be revised by the Supreme Court on appeal; but if parties wish to question the exercise of this discretionary power by the District Judge, they should place on file testimony to show that the Judge was governed by an unnecessary caution towards the party giving bond. *Ibid.*

4. In the absence of allegations and proof to the contrary, the presumption is, that a tutor has done his duty in defending a suit against a minor, and he must, therefore, be allowed a credit for the payment of the judgment, as well as counsel fees for defending the same and rendering the tutor's account. *McWilliams* v. *McWilliams*, 88.

5. The tutor cannot, even for the *necessary maintenance* and *education* of the minor, expend more than the revenues of his estate, without the advice of a family meeting. *Ibid.*

6. The Act of 1855 was intended as a relief to tutors, by allowing the homologation of their accounts, and giving to such a decree certain efficacy. But this Act does not free them from the control which the Probate Court exercises over them by virtue of Art. 350 of C. C. They are bound to render an account whenever they receive orders to that effect from the court, upon the suggestion of the under-tutor or any one else; or they may, at their option, render an account annually, and have the same homologated contradictorily with the under-tutor. *Gaillard* v. *Foster*, 121.

7. The court cannot render a judgment against the tutor, in favor of the under-tutor, for any specific amount. *Ibid.*

8. The tutor has a right to compromise respecting the rights of his ward, but he must act under the authority of the Judge, granted on the advice of a family meeting. Such a contract may be made for the purpose of preventing a lawsuit as well as to put an end to one already instituted. *Graham* v. *Hester*, 148.

9. A compromise made by the tutor, without the authorization of the Judge given by and with the advice of a family meeting, may be treated by the minor as an absolute nullity; but when it is made in pursuance of these legal formalities, the minor cannot, upon becoming of age, treat it as an absolute nullity. *Ibid.*

TUTORS AND TUTORSHIP (*Continued*).

10. Under these circumstances, if the contract be voidable, the minor must resort to a direct action to have it rescinded; he cannot question its validity collaterally,—and the tutor who has made the contract himself, cannot treat it as a nullity. *Quære:* Could the tutor in such a case institute the action of nullity? *Ibid.*

11. Where a tutor presents a petition to the court, praying that a special mortgage which he tenders to secure the rights of the minors may be accepted, and the tacit mortgage annulled, he is entitled to a formal judgment on his petition, and this judgment must be entered on the minutes of the court, and reduced to writing and signed by the Judge.
State v. *Judge 2d District Court*, 164.

12. A sale made by a minor after his emancipation, and after a confession of judgment made by him on the account of the tutor, is null, when it has not been preceded by the rendition of the account and vouchers at least ten days previous to the passage of the act. *White* v. *Gleason*, 479.

13. The tutor represents the minor so completely, that when he has once brought a suit for him, or answered an action against him, no further petition or answer can be required on the part of the minor; and a judgment rendered in the name of his tutor, so long as the tutorship lasts, is a judgment for or against the minor himself. *Martel* v. *Richard*, 598.

14. A suit properly brought by the tutor for a minor, may be prosecuted by the minor after attaining majority, without any new citation or formal change in the pleadings. *Ibid.*

See PRINCIPAL AND SURETY—*Bradley* v. *Trousdale*, 206.
See PRACTICE—*Cummings* v. *Erwin*, 289.
See PARTITION—*Hagan* v. *Grimshaw*, 394.

USAGE.

See COMMON CARRIERS—*Cranwell* v. *Ship Fanny Fosdick*, 436.

USUFRUCT.

1. Under the Spanish law, the usufructuary had only the right to grant leases of the property held by him, and the usufruct terminated if he alienated his right, and it also terminated at the death of the usufructuary, as under our law. *Declouet* v. *Borel*, 606.

2. A clause, in an agreement establishing a usufruct, by which it is provided that such usufruct shall be inheritable, must be considered as not written. *Ibid.*

See DONATIONS—*Succession of Skipwith*, 209.
Williams v. *Hardy*, 286.
Martin v. *Martin*, 585.
Breaux v. *Carmouche*, 588.
See TRUST—*Hullin* v. *Fauré*, 622.

USURY.

1. The charge by merchants, according to custom, of two and a-half per cent. commission for the sale of cotton, and the like rate for accepting bills or endorsing notes for the accomodation of customers and the purchase of supplies, do not form any part of the interest on money loaned or advanced, and cannot be said to be usurious charges, as commissions for *advancing money* have been held to be, when claimed in addition to the highest rate of conventional interest. *Byrne* v. *Grayson*, 457.

USURY (*Continued*).

2. To constitute usury, there must be a loan of money; and in the *bona fide* sale or discount of a promissory note, made by a factor, there is no loan of money, and can consequently be no usury. *Ibid.*

3. The decision in the case of *Martin Crane* v. *W. Beatty*, ante p. 329, affirmed, to the effect that the provisions of the Act of March 20, 1856, cannot be extended so as to authorize and legalize transactions, between debtors and creditors, wherein usurious interest is added to the sum really due, as a consideration for an extension of time or an indulgence to the creditors. *Campbell* v. *Hilliard*, 537.

4. In such cases, the penalty prescribed by the Act of 1855, regulating interest, will be applied, and the forfeiture of all interest will be decreed. *Ibid.*

See PRESCRIPTION—*Weaver* v. *Maillot*, 395.

WAIVER.

See BILLS OF EXCHANGE, &c.—*Johnson* v. *Watt*, 428.

WARRANTY.

1. In a petitory action to recover property which has been sold under a judgment of partition, as belonging to the succession of one brother, while in reality it belongs to that of another, the parties plaintiff being the legal heirs to both, will not be held to have warranted the title of the purchaser, when the record does not show that they ever accepted the succession of the first, or did any act of heirship which would make them responsible. *Winn* v *Dickson*, 273.

2. Before a purchaser evicted from property purchased under execution can demand a reimbursement of the price from the *seizing creditor*, he must first have failed to recover it from the *seized debtor*, on execution sued out for that purpose. *Haynes* v. *Courtney*, 630.

See ESTOPPEL—*McQueen* v. *Sandel*, 140.
See REDHIBITION—*Belknap* v. *Kendig*, 203.
See MORTGAGES—*Ranney* v. *Burthe*, 343.
See ABSENTEE—*Pagett* v. *Curtis*, 451.
See REDHIBITION—*Burnham* v. *Clark*, 517.

WILLS.

See DONATIONS.

WITNESS.

1. The declaration of an attorney, that a certain person is not a witness, will not prevent him from afterwards putting such person on the stand to testify. *State* v. *Gore*, 79.

2. The decision in the case of *Evans* v. *Gray*, 1 N. S. 712, reaffirmed to the effect that, when interest in a witness is established by evidence *aliunde*, it cannot be disproved by his own testimony. *Young* v. *Cook*, 126.

3. Where a suit is brought on a due bill signed by an agent, and the answer specially denies the agency, the agent, on being released from personal responsibility by the plaintiff, may be heard as a witness to prove the fact that the money borrowed, for which the due bill was given, was applied to the payment of the debts of his principal. *Garland* v. *Scott*, 143.

WITNESS (*Continued*).

4. One who is bound as joint and several obligor with both plaintiff and defendant, upon the face of the note which is sued on, cannot be heard as a witness to fix the sole and exclusive liability upon one of the parties, although released by the other party who offers his testimony.
Huff v. *Freeman*, 240.

5. The recognized exception as to the competency of the wife to testify against her husband, where she has sustained a personal injury, does not extend to cases of bigamy. In these, the lawful wife is held to be incompetent, whilst the second wife's testimony is not liable to this objection.
State v. *McDavid*, 403.

6. Although a witness testifies that he has no interest in the suit, yet, if it appears by his examination on the *voir dire*, that he has an interest, he cannot be heard. *Copse* v. *Eddins*, 528.

7. Where a defendant is sued as partner of a commercial firm, on an obligation not signed by him or with his name, the members of the firm are competent witnesses for him, to prove that he was not a partner.
James v. *Brooke*, 541.

8. A vendor who is not bound in warranty, is a competent witness to testify in a case where the title of property sold by him is involved.
Hyman v. *Bailey*, 560.

9. The commission allowed an executor does not constitute such an interest as disqualifies him from testifying on behalf of the estate which he represents. *Smith* v. *Lambeth*, 566.

10. Jurors are incompetent as witnesses to impeach their own verdict.
Duhon v. *Landry*, 591.

11. A natural son is not a competent witness in controversies which relate to the succession of his deceased natural father. *Lazare* v. *Jacques*, 599.

See EVIDENCE—*Langley* v. *Burrows*, 392.
Garrett v. *Crooks*, 483.
See INTEREST—*Bonner* v. *Copley*, 504.